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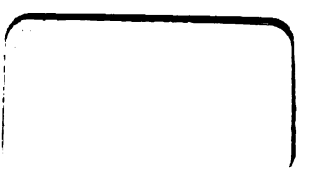

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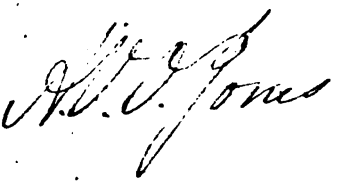

THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

IN THREE VOLUMES.

VOL. II.

THE

FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY upon LITTLETON:

Not the NAME of the AUTHOR only, but of the LAW itself.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

Hæc ego grandævus posui tibi, candide lector,

Authore EDWARDO COKE, MILITE.

The SIXTEENTH EDITION,

REVISED AND CORRECTED, with Additions of NOTES, REFERENCES, and PROPER TABLES.

BY FRANCIS HARGRAVE AND CHARLES BUTLER,

ESQUIRES, OF LINCOLN'S-INN.

Including also the NOTES of

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[201. a.]

THE

FIRST PART

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INSTITUTES

OF THE

LAWS OF ENGLAND.

LIB. III. CHAP. 5. Of Eſtates upon Condition. Sect. (1) 325.

*ESTATES que homes ount en terres ou tenements * ſur condition † ſont de deux maners,* ſcilicet, ‡ *ou ils ont eſtate ſur condition en fait, ou ſur condition en ley,* ‖ *&c. Sur condition en fait eſt, ſicome un home per fait endent enfeoffa un auter en fee* § *ſimple, reſervant a luy et a ſes heires annualment certaine rent payable a un feaſt ou a divers feaſts per an, ſur condition que ſi le rent ſoit aderere, &c. que bien liſt al feoffor et a ces heires en meſmes les terres ou tenements de entrer, &c. Ou ſi terre ſoit alien a un home en fee rendant a luy certaine rent, &c. et s'il happa que le rent ſoit aderere per un ſemaigne apres aſcun jour de payment de ceo, ou per un mois apres aſcun jour de payment de ceo, ou per** un demy, &c. que adonques bien lirroit a le feoffor et a les heires d'entrer, &c.* ‡‡ *En*

ESTATES which men have in lands or tenements upon condition are of two ſorts, viz. either they have eſtate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee ſimple, reſerving to him and his heires yearely a certaine rent payable at one feaſt or divers feaſts *per annum*, on condition that if the rent be behind, &c. that it ſhall bee lawfull for the feoffor and his heires into the ſame lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeare, &c. that then it ſhall be lawfull to the feoffor and his heires to enter, &c. In theſe caſes if the rent be not paid at ſuch

(1) [See Note 24.]
* *ſur condition* not in L. and M. nor Roh.
† *de—ex* in L. and M. and Roh.
‡ *ou* not in L. and M. nor Roh.
‖ *&c.* not in L. and M. nor Roh.
§ *ſimple* not in L. and M. nor Roh.
** *un—demy* not in L. and M. nor Roh.
‡‡ *Et* added in L. and M. and Roh.

En ceux caſes ſi le rent ne ſoit paie a tiel temps ou devant tiel temps limit et ſpecifie deins le condition compriſes en l'endenture, donques poit le feoffor ou ſes heires entrer en tielx terres ou tenements, et eux en ſon primer eſtate aver et tener, et de ceo ouſle le feoffee tout net. Et eſt appelle eſtate ſur condition, pur ceo que le ſtate le feoffee eſt defeaſible, ſi le condition ne ſoit performe, &c.

ſuch time, or before ſuch time limited and ſpecified within the condition compriſed in the indenture, then may the feoffor or his heires enter into ſuch lands or tenements, and them in his former eſtate to have and hold, and the feoffee quite to ouſte thereof. And it is called an eſtate upon condition, becauſe that the ſtate of the feoffee is defeaſible, if the condition bee not performed, &c.

Glanvill. lib. 10. cap. 8. Bracton lib. 2. cap. 5, 6, 7, &c. lib. 4. fol. 213. Brit. cap. 36. & fol. 89, 99. 114. 130. 205, 206, 207. 249. Fleta lib. 3. cap. 9. & lib. 5. ca. 5. Mirr. cap. 2. ſect. 15. & 17.

"*SUR condition.*" *Littleton* having before ſpoken of eſtates abſolute, now beginneth to entreate of eſtates upon condition. And a condition annexed to the realtie, whereof *Littleton* here ſpeaketh in the legall underſtanding, *eſt modus*, a qualitie annexed by him that hath eſtate, intereſt, or right, to the ſame, whereby an eſtate, &c. may either be defeated, or enlarged, or created upon an incertaine event. *Conditio dicitur cùm quid in caſum incertum qui poteſt tendere ad eſſe aut non eſſe confertur.*

"*Sur condition en fait,*" *quæ eſt facti*, that is, upon a condition expreſſed by the partie in legall termes of law.

(Plow. 23. a. 1 Roll. Abr. 420. 2 Rep. 79.)

"*Ou ſur condition en ley, &c.*" *quæ eſt juris*, that is, *tacitè* created by law without any words uſed by the partie. Againe, *Littleton* ſubdivideth conditions in deed (though not in expreſſe words) into conditions precedent (of which it is ſaid, *Conditio adimpleri debet priuſquam ſequatur effectus*) and conditions ſubſequent. Againe, of conditions in deed ſome be affirmative, and ſome in the negative; and ſome in the affirmative, which imply a negative: ſome make the eſtate, whereunto they are annexed, voydable by entrie or clayme, and ſome make the eſtate void *ipſo facto*, without entrie or claime. [201. b.

Mir. cap. 2. ſect. 15 & 17.

Alſo of conditions in deed, ſome bee annexed to the rent reſerved out of the land, and ſome to collaterall acts, &c. ſome be ſingle, ſome in the conjunctive, ſome in the disjunctive, as ſhall evidently appeare in this Chapter, where the examples of theſe diviſions ſhall be explained in their proper place.

"*En ley, &c.*" Of conditions in law more ſhall be ſaid hereafter in this Chapter.

"*Sur condition en fait eſt, ſicome un home per fait indent, &c.*" Here *Littleton* putteth one example of ſixe ſeverall kinds of conditions. That is, firſt, of a ſingle condition in deed. Secondly, of a condition ſubſequent to the eſtate. Thirdly, a condition annexed to the rent, &c. Fourthly, a condition that defeateth the eſtate. Fifthly, a condition that defeateth not the eſtate before an entrie. And laſtly, a condition in the affirmative, which implieth a negative, (as behind or unpaid implieth a negative) viz. not paid. All which doe appeare by the expreſſe words of *Littleton*.

"*Rend' a luy certaine rent, &c.*" Here by this (*&c.*) is implyed for life, in taile, or in fee.

"*Et*

" Et en ceſt caſe ſi le rent ne ſoit pay a tiel temps, &c. donques poet le feoffor ou ſes heires entrer, &c." By this Section, and by the (*&c.*) therein contained, ſixe things are to be underſtood.

First, Where our author ſaith, *ſi le rent ſoit arere*, that though the rent be behind and not paid [*b*], yet if the feoffor doth not demand the ſame, &c. he ſhall never re-enter (1), becauſe the land is the principall debtor; for the rent iſſueth out of the land, and in an aſſiſe for the rent the land ſhall be put in view; and if the land be evicted by a title paramount, the rent is avoyded, and after ſuch eviction the perſon of the feoffee ſhall not be charged therewith, for the perſon of the feoffee was only charged with the rent in reſpect of the grant out of the land.

[*b*] 40 Aſſ. 11. 20 H. 6. 30, 31. 6 H. 7. 7. 19 H. 6. 76. 20 H. 6 32. 22 H. 6. 46. Pl. Com Kidwely's caſe, fo. 70. & Hill and Grange's caſe, fol. 73.

Secondly, The demand muſt be made upon the land, becauſe the land is the debtor, and that is the place of demand appointed by law (2).

(Noy 23. 1 Roll. Abr. 459, 460. Perk. ſect. 827, Noy 23.)

If the king maketh a leaſe for yeares, rendring a rent payable at his receipt at *Weſtminſter*, and after the king granteth the reverſion to another and his heires, the grantee ſhall demand the rent upon the land, and not at the king's receipt at *Weſtminſter*; for as the law without expreſſe words doth appoint the leſſee in the king's caſe to pay it at the king's receipt, ſo in caſe of a ſubject, the law appoints the demand to be on the land (3).

Lib. 4. fol. 72, 73. Borough's caſe.

If there be a houſe upon the land, he muſt demand the rent at the houſe. And he cannot demand it at the backe doore of the houſe but at the fore doore, becauſe the demand muſt ever be made at the moſt notorious place. And it is not material whether any perſon be ther or no.

49 Aſſ. 5. 15 Eliz. Di. 329.

Albeit the feoffee be in the hall or other part of the houſe, yet the feoffor neede not [*c*] but come to the fore doore, for that is the place appointed by law, albeit the doore be open.

[*c*] Bendloes en Treſp. 4 & 5. Ph. & Mar.

[202. a.] [*d*] If the feoffment were made of a wood only, the demand muſt be made at the gate of the wood, or at ſome high way leading through the wood or other moſt notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which hee will, and albeit the feoffee be in ſome other part of the wood redie to pay the rent, yet that ſhall not availe him. *Et ſic de ſimilibus.*

[*d*] 15 Eliz. Dyer 329.

(Ante 145. a.)

Thirdly, And if the feoffor demand it on the ground at a place which is not moſt notorious, as at the backe doore of a houſe, &c. and in pleading the feoffor alleadge a demand of the rent generally at the houſe, the feoffee may traverſe the demand, and upon the evidence it ſhall be found for him, for that it was a void demand.

Fourthly, If the rent be reſerved to be paid at any place from the land, yet it is in law a rent, and the feoffor muſt demand it at the place appointed by the parties, obſerving that which hath beene ſaid before concerning the moſt notorious place.

Lib. 4. Borroughe's caſe, fol. 73. Pl. Com. 70.

Fiftly, And all this is to be underſtood when the feoffee is abſent; for if the feoffee commeth to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the moſt notorious place, nor at the laſt inſtant, the

(1) [See Note 85.]

(2) For the place of performing the condition, ſee Litt. Sect. 340, and the Commentary on that Section.

(3) [See Note 86.]

(Poſt. 211. a.) the feoffor is bound to receive it, or elſe he ſhall not take any advantage of any demand of the rent for that day (1).

(7 Rep. 28.) Sixtly, Therefore the place of demand being now known, it is further to be known what time the law hath appointed for the ſame. This partly appeareth by that which hath beene laſt ſaid. For albeit the laſt time of demand of the rent is ſuch a convenient time before the ſunne ſetting of the laſt day of payment as the money may be numbred and received, notwithſtanding, if the tender be made to him that is to receive it upon any part of the land at any time of the laſt day of payment, and he refuſeth, the condition is (6 Rep. 114. b.) ſaved for that time, for by the expreſſe reſervation the money is to be paid on the day indefinitely, and convenient time before the laſt inſtant, is the uttermoſt time appointed by law, to the intent (2 Cro. 423. 500. (2) that then both parties ſhould meet together, the one to demand and receive, and the other to pay it, ſo as the one ſhould not prevent the other. But if the parties meet upon any part of the land whatſoever on the ſame day, the tender ſhall ſave the condition for ever for that time.

Lib. 5. fol. 114. Wade's caſe. Pl. Com. Hill. et Grange's caſe, 167. 172. 20 H. 6. 30, 31. 6 H. 7. 3. And if the reſervation of the rent be (as here *Littleton* putteth the caſe) at certaine feaſts, with condition that if it happen the rent to be behind by the ſpace of a weeke after any day of payment, &c. in this caſe the feoffor needeth not demand it on the feaſt day, but the uttermoſt time for the demand is a convenient time (as hath beene ſaid) before the laſt day of the weeke, unleſſe before that the feoffee meet the feoffor upon the land and tender the rent as is aforeſaid (3).

Mich. 40 & 41. Eliz. inter Stanly & Read. Lib. 7. fo. 28. Maundie's caſe. If a rent be granted payable at a certaine day, and if it be behinde and demanded that the grantee ſhall diſtreine for it, in this caſe the grantee need not demand it at the day; but if he demand it at any time after he ſhall diſtreyne for it, for the grantee hath election in this caſe to demand it when he will to inable him to diſtreine.

8 H. 7. 7. b. "*Et eux en ſon primer eſtate aver, &c.*" Regularly it is true that he that entreth for a condition broken ſhall be ſeiſed in his firſt eſtate, or of that eſtate which hee had at the time of the eſtate made upon condition, but yet this fayleth in many caſes.

4 H. 6. 2. lib. 8. fo. 43, 44. Whittingham's caſe. 5 H. 7. 6. a. (Poſt. 297. b.) 1. In reſpect of impoſſibility. As if a man ſeiſed of lands in the right of his wife maketh a feoffment in fee by deed indented, upon condition that the feoffee ſhould demiſe the land to the feoffor for his life, &c. the huſband dieth, the condition is broken, in this caſe the heire of the huſband ſhall enter for the condition broken, but it is impoſſible for him to have the eſtate that the feoffor had at the time of the condition made: for therein he had but an eſtate in the right of his wife, which by the coverture was diſſolved. And therefore when the heire hath entred for the condition broken and defeated the feoffment, his eſtate doth vaniſh, and preſently the ſtate is veſted in the wife.

2. In reſpect of neceſſity. If *Ceſty que uſe* after the ſtatute of *R.* 3, and before the ſtatute of 27 *H.* 8, had made a feoffment in fee upon condition, and after had entred for the condition broken; in

(1) For the difference of the demand to be made in caſe of a re-entry to avoid an eſtate, or the forfeiture of a ſum *nomine pœnæ*; and of the demand to be made in caſe of an entry to diſtrain, ſee before 144. a.

(2) [See Note 87.]

(3) [See Note 88.]

in this caſe he had but an uſe when the feoffment was made, but now he ſhall be ſeiſed of the whole ſtate of the land. So that as in the former caſe, the anceſtor had ſomewhat at the making of the condition, and the heire ſhall have nothing when he hath entred for the condition broken, ſo in this caſe the feoffor had no eſtate or intereſt in the land at the time of the condition made, but a baſe uſe; yet after his entrie for the condition broken he ſhall be ſeiſed of the whole ſtate in the land, and that alſo for neceſſitie, for by the feoffment in fee of *Ceſty que uſe*, the whole eſtate and right was deveſted out of the feoffees. And therfore of neceſſitie the feoffor muſt gaine the whole eſtate by his entrie for the condition broken.

Tenant in ſpeciall taile hath iſſue, and his wife dieth, tenant in taile maketh a feoffment in fee upon condition, the iſſue dieth, the condition is broken, the feoffor re-enters, he ſhall have but an eſtate for life, as tenant in taile *apres poſſibility* of iſſue extinct by the re-entry, and yet he had an eſtate taile at the time of the feoffement, and that alſo for neceſſity.

[202. b.] (8 Rep. 43, 44.)

3. In ſome caſes the feoffor by his re-entry ſhall be in his former eſtate, but not in reſpect of ſome collaterall qualities. As if tenant by homage anceſtrell maketh a feoffement in fee upon condition, and entreth upon the condition broken, it ſhall never be holden by homage anceſtrell againe. And ſo it is if a copihold eſcheate, and the lord make a feoffement in fee upon condition, and entreth for the condition broken. And the reaſon in both theſe caſes is, for that the cuſtome or preſcription for the time is interrupted. (Ante 103. a.)

(1) Lord and tenant by fealty and rent, the lord is in ſeiſin of his rent, the lord granteth his ſeignory to another and to his heires upon condition, the tenant attorneth and payeth his rent to the grantee, the condition is broken, the lord diſtreineth for his rent, and reſcous is made, he ſhall be in his former eſtate, and yet the former ſeiſin ſhall not enable him to have an aſſiſe without a new ſeiſin. 15 Aſſ. 12. (4 Rep. 9. b.)

If tenant in taile make a feoffment in fee upon condition, and dieth, the iſſue in taile within age doth enter for the condition broken, he ſhall be firſt in as tenant in fee ſimple as heire to his father, and conſequently and inſtantly he ſhall be remitted. But if the heire be of full age, he ſhal not be remitted, becauſe he might have had his *formedon* againſt the feoffee, and the entrie for the condition is his owne act; but more ſhall be ſaid hereof in his proper place in the Chapter of *Remitter*. 9 H. 7. 7. (Poſt. 350. b.)

If a man make a feoffment in fee of *Blacke Acre* and *White Acre* upon condition, &c. and for breach thereof that he ſhall enter into *Blacke Acre*, this is good. 2 H. 6. 4. (1 Roll. Abr. 412.)

If tenant for life make a feoffment in fee upon condition, and entreth for the condition broken, he ſhall be tenant for life againe, but ſubject to a forfeiture, for the ſtate is reduced, but the forfeiture is not purged. (2) 43 Aſſ. 47. 13 E. 4. 4. 2 H. 5. 7. b. 39 Aſſ. 15. 11 H. 5. 25. 16 Aſſ. 47. (1 Roll. Abr. 856. Poſt. 252. a.)

(1) [See Note 89.] (2) [See Note 90.]

Sect. 326.

EN meſme le manner, eſt ſi terres ſont dones en le taile, où leſſes a terme de vie ou des ans, ſur †condition, &c.*

IN the ſame manner it is if lands be given in taile, or let for terme of life or of yeares, upon condition, &c.

"*Sur condition, &c.*" This implyeth the ſeverall kindes of conditions in deed before ſpecified.

Sect. 327.

*MES lou feoffment eſt fait de certaine terres reſervant certain rent, ‡ &c. ſur tiel condition, que ſi le rent ſoit aderere, § que bien lirroit al feoffor et ‖ ſes heires d'entrer, ** et la terre tener tanque ils ſoient ſatisfies ou payes de le rent aderere, &c. en ceſt caſe ſi le rent ſoit aderere, et le feoffor ou ſes heires enter, le feoffee n'eſt pas exclude de ceo tout † net, mes le feoffor avera et tiendra la terre, et prendra ent les profits, tanque †† il ſoit ſatisfie de le rent aderere; et quant il eſt ſatisfie, donque poit le feoffee ‡† re-entrer en meſme la terre, et ceo tener ‖‖ come il tenoit adevant. Car en tiel cas le feoffor avera §§ la terre forſque en maner come pur un diſtres, tanque ** il ſoit ſatisfie de le rent, &c. coment †† que il prendre les profits en le meane temps ‡‡ a ſon uſe demeſne, &c.*

BUT where a feoffment is made of certaine lands reſerving a certaine rent, &c. upon ſuch condition, that if the rent be behind, that it ſhall be lawfull for the feoffor and his heires to enter, and to hold the land untill he be ſatisfied or payed the rent behinde, &c. in this caſe if the rent be behind, and the feoffor or his heires enter, the feoffee is not altogether excluded from this, but the feoffor ſhall have and hold the land, and thereof take the profits, until he be ſatisfied of the rent behinde; and when he is ſatisfied, then may the feoffee re-enter into the ſame land, and hold it as he held it before. For in this caſe the feoffor ſhal have the land but in maner as for a diſtreſſe, until he be ſatisfied of the rent, &c. though he take the profits in the meane time to his owne uſe, &c.

Vide Sect 332. 19 E. tit barre 280. 19 R. 2. dette rent 10. Pl. Com 524.

"*ET la terre tener tanque ils ſoyent ſatisfies ou paies de le rent aderere, &c.*" By this it is implyed, that if ſuch a feoffment be made, reſerving *(b)* (for example) 8 markes rent at the feaſt

[b] 20 E. 3. tit. covenant. 3.

* *a terme* added in L. and M. and Roh.
† *ti. l* added in L. and M. and Roh.
‡ *&c* not in L. and M.
§ *il* added in L. and M.
‖ *a* added in L. and M.
** *en la terre tenus de eux* in L. and M.
† *de* added in L. and M. and Roh.
†† *que* added in L. and M. and Roh.
‡† *re-entrer—entre* in L. and M. and Roh.
‖‖ *come—coment* in L. and M. and Roh.
§§ *avera la terre—ceo aver* in L. and M. and Roh.
** *que* added in L. and M. and Roh.
†† *que* not in L. and M. nor Roh.
‡‡ *a ſon uſe demeſne* not in L. and M. nor Roh.

feaſt of *Eaſter*, with ſuch a condition as is afore ſaid, the feoffor at the feaſt day demands the rent, the feoffee paieth unto him 6 markes parcell of the rent, the feoffor entreth into the lands and taketh the profits towards ſatisfaction. Afterwards the feoffee doth tender the two markes reſidue of the rent to the feoffor upon the land, who refuſeth it. It hath beene adjudged that the [203. a.] feoffee upon the refuſal may enter into the land; (1) for when the feoffor is ſatisfied either by perception of the profits or by payment or tender and refuſall, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of *Littleton*, viz. *(untill he be ſatisfied.)* And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken, and retaine the land untill he be ſatisfied of the whole. All which is worthy of obſervation.

(Autrement in, caſe de obligation ou debt per contract. Doc. Pla. 109.)

" Et en tiel caſe le feoffor avera la terre forſque en manner come un diſtreſſe, tanque il ſoit ſatisfie de la rent, &c." By this it appeareth that the feoffor by his re-entry gaineth no eſtate of freehold (2), but an intereſt by the agreement of the parties to take the profits in nature of a diſtreſſe. And therefore if a man maketh a leaſe for life with a reſervation of a rent, and ſuch a condition, if he enter [upon] the condition broken, and take the profits of the land *quouſque, &c.* he ſhall not have an action of debt for the rent *arere*, for that the freehold of the leſſee doth continue, and therefore the booke [c] that ſeemeth to the contrary is falſe printed, and the true caſe was of a leaſe for yeares, as it appeareth afterwards in the ſame page of the leaſe.

(Sid. 223. 268. 344. Plow. 524. b.)

[c] 2 E. 3. fo. 7.

But herein alſo a diverſity worthy the obſervation is implyed, viz. If a man make a leaſe for yeares, reſerving a rent with a condition, that if the rent be behind, that the leſſor ſhall re-enter and take the profits untill thereof he be ſatisfied, there the profits ſhall be accounted as parcell of the ſatisfaction, and during the time that he ſo taketh the profits he ſhall not have an action of debt for the rent for the ſatisfaction whereof he taketh the profits. But if the condition be that he ſhall take the profits untill the feoffor be ſatisfied or paid of the rent, without ſaying (thereof) or to the like effect, there the profits ſhall be accounted no part of the ſatisfaction but to haſten the [leſſor] to pay it, and as *Littleton* here ſaith, that untill he be ſatisfied he ſhall take the profits in the meane time to his own uſe (3).

30 E. 3. 7. Vid. ſemblable. 27 H. 8. 4. 43 E. 3. 21. 31 Aſſ. Pl. 26. Vid. le ſtatute de Merton ca. 6. and obſerve theſe words, quod inde per-

cipere poſſint duplicem valorem, &c. Et ç. 7, without this word (inde)

(See ant. 82. b.)

(1) [See Note 91.]
(2) [See Note 92.]
(3) [See Note 93.]

Sect. 328.

ITEM, divers parolx (enter ‖‖ autors) y ſont, queux per vertue de eux meſmes font eſtates ſur condition; un eſt le parol §§ ſub conditione: ficome A. enfeoffa B. de certaine terre, habendum et tenendum eidem *B.* et hæredibus ſuis, ſub * conditione, quòd idem *B.* et hæredes ſui ſolvant ſeu ſolvi faciant præfat' *A.* et hæredibus ſuis annuatim talem redditum, &c. *En ceſt caſe ſans aſcun pluis dire le feoffee ad eſtate ſur condition.*

ALSO, divers words (amongſt others) there be, which by vertue of themſelves make eſtates upon condition; one is the word (*ſub condic.*) as if *A.* infeoffe *B.* of certaine land, to have and to hold to the ſaid *B.* and his heires, upon condition, that the ſaid *B.* and his heires do pay or cauſe to be paid to the aforeſaid *A.* and his heires yearely ſuch a rent, &c. In this caſe without any more ſaying the feoffee hath an eſtate upon condition.

Sub Conditione. Marie Dyer, 138. 27 H. 8. 15. 13 H. 4. Enter Cong. 57. 29 Aſſ. 7. 33 Aſſ. 11. 40 Aſſ. 13. Bracton ubi ſupra. Fleta lib. 4. ca. 9. Brit. cap. 36. & ubi ſupra.

HERE in this and the next two Sections *Littleton* doth put four examples of words that make conditions in deed: and firſt *ſub conditione.* This is the moſt expreſſe and proper condition in deed, and therefore our author beginneth with it.

Vid. Sect. 325.

"*Talem redditum, &c.*" This (*&c.*) implieth any other rent or ſum in groſſe, or any collaterall condition whatſoever, either to be performed by the feoffee (whereof our author here putteth his caſe) or by the feoffor, and extendeth to all kinds of conditions in deed, before ſpecified. [203. b.]

Sect. 329.

AUXY, ſi les † parols fueront tielx, Proviſo ſemper quòd prædict' *B.* ſolvat ſeu ſolvi faciat præfato *A.* talem redditum, &c. *ou fueront tielx,* Ita quòd prædict' *B.* ſolvat ſeu ſolvi faciat præfato *A.* talem redditum, &c. *en ceux caſes ſauns pluis dire, le feoffee ‖ n'ad eſtate forſque ſur condition; iſſint que s'il ne performaſt le condition, le feoffor et ſes heires poyent entrer, &c.*

ALSO, if the words were ſuch, Provided alwaies, that the aforeſaid *B.* do pay or cauſe to be paid to the aforeſaid *A.* ſuch a rent, &c. or theſe, So that the ſaid *B.* do pay or cauſe to be paid to the ſaid *A.* ſuch a rent, &c. in theſe caſes without more ſaying, the feoffee hath but an eſtate upon condition; ſo as if he doth not performe the condition, the feoffor and his heires may enter, &c.

"*PROVISO*

‖‖ *les* added in L. and M. and Roh.
§§ *ſub conditione—de condicion* in L. and M. and Roh.
* *iſtâ* added in L. and M. and Roh.
† *parols—condicions* in L. and M. and Roh.
‖ *n' ad—ad* in L. and M.

"*PROVISO semper, quòd B. solvat, &c.*" Our author putteth his case where a *proviso* commeth alone. And so it is if a man by indenture letteth lands for yeares, provided alwaies, and it is covenanted and agreed between the said parties, that the lessee should not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words (1).

Proviso. Vid. Sect. 220. Dier. 29 H. 8. fol. 13. 27 H. 8. fol. 14, 15. 13 H. 4. Entre Cong. 57. Seignior Cromwell's case, lib. 2. fo. 71, 72. at (2 Rep. 70. b.)

large. 35 H. 8. tit. condition. Br. lib. 8. 89. Frances' case.

This word *proviso* shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometime it shal amount to a covenant. All which do appeare by the authorities in the margent*.

[*] 27 H. 8. 15. &c.

For the (*&c.*) in this Section explanation is made in the Section next before.

Ita quod. Fleta lib. 4. ca. 9. Bracton ubi supra. Britton ubi supra.

"*Ou fueront tiels*, Ita quòd." This is the third condition in deed, whereof our author maketh mention.

(Dyer 13. b.)

Sect. 330.

*ITEM, auters parols sont en un fait queux causont les tenements estre conditionals. Sicome sur tiel feoffment un rent est reserve al feoffor, &c. et puis soit mitte en le fait * cest parol*, Quòd si contingat redditum prædictum a retrò fore in parte vel in toto,† quòd tunc benè licebit *a le feoffor et a ses heires d'entrer, &c. ceo est un fait sur condition.*

ALSO, there bee other words in a deede which cause the tenements to be conditionall. As if upon such feoffment a rent be reserved to the feoffor, &c. and afterward this word is put into the deed, That if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heires to enter, &c. this is a deed upon condition.

"*QUOD si contingat, &c.*" This is the fourth condition in deed set downe by our author.

(Ant. 146. b.) 6 E. 2. Entrie Cong. 65. 8 E. 2. Aff. 320.

adjudged. Quod si contingat. Pasch. 37 Eliz. Rot. 254. inter Sayer et Hares in Com. Banco.

[204. a.] "*D'entrer, &c.*" Hereby it is evident, that some words of themselves do make a condition, and some other (whereof our authour here and in the next Section * putteth an example) do not of themselves make a condition without a conclusion and clause of re-entrie: and manie times (*si*) makes a condition, and sometimes a limitation, as hereafter shall be said in this Chapter.

* Vid. Sect. 331.

3 H. 6. 7. Si Flet. li. 4. ca. 9. Bract. li. 4. fo. 213. b. (5 Rep. 9.)

Inesse potest donationi modus, conditio, sive causa. * *Scito quòd (ut) modus est (si) conditio (quia) causa.*

* 4 Mar. Dyer 138. b.

Conditio is explained before. *Modus* is at this day properly taken for a modification, limitation, or qualification, for the which also the law hath appointed apt words; and because *Littleton* speaketh of

Bract. ubi supra.

(1) [See Note 94.]

* *cest parol* not in L. and M. nor in Roh.
† *&c.* added in L. and M. and in Roh.

of this alſo in this end of the Chapter, I will reſerve this matter to his proper place, where the reader ſhall perceive excellent matter of learning touching this point.

Cauſa, the cauſe or conſideration of the grant. And herein there is a diverſitie betweene a gift of lands, and a gift of an annuitie or ſuch like. For example, if a man grant an annuitie *pro unâ acrâ terræ*, in this caſe this word *pro* ſheweth the cauſe of the grant, and therefore amounteth to a condition; for if the acre of land be evicted by an elder title, the annuitie ſhall ceaſe, for *ceſſante cauſâ ceſſat effectus*.

Pro. 24 E. 3. 34. (Hob. 41, 42. 10 Rep. 42. Plo. 141. a. 7 Rep. 9. b. 10. 28. b. Ant. 144. a. 9 Rep. 50. a. Poſt. 257. a.) 9 E. 4. 20. 32 E. 3. Annu. 30. 14 E. 4. 4. 15 E. 4. 2. b. 8 H. 6. 23. 5 E. 2. tit. Ann. 44. 41 E. 3. 19. 32 E. 1. Avowrie 242.

And ſo if an annuitie be granted *pro decimis*, &c. if the grantee be unjuſtly diſturbed of the tithes the annuitie ceaſeth. And ſo it is if an annuitie be granted *pro conſilio*, and the grantee refuſe to give counſell, the annuitie ceaſeth. So if an annuitie be granted *quòd præſtaret conſilium*, this makes the grant conditionall.

But if *A. pro conſilio impenſo*, &c. make a feoffement, or a leaſe for life, of an acre, or *pro unâ acrâ terræ*, &c. albeit he denieth counſell, or that the acre be evicted, yet *A.* ſhall not re-enter, for in this caſe there ought to be legall words of condition or qualification, for the cauſe or conſideration ſhall not avoyd the ſtate of the feoffee; and the reaſon of this diverſitie is, for that the ſtate of the land is executed, and the annuitie executorie.

21 E. 4. 49. 22 E. 4. 28. 35 H. 6. 2. 10 E. 3. 44. 5 E. 2. 9 E. 4. 20. 15 E. 4. 8.

Flet. li. 5. ca. 34. 34 Aſſ. 1. 40 Aſſ. 13.

And yet ſometime in caſe of lands or tenements *(cauſa)* ſhall make a condition. As, if a woman give lands to a man and his heires, *cauſâ matrimonii prælocuti*, in this caſe if ſhee either marrie the man, or the man refuſe to marrie her, ſhe ſhall have the land againe to her and to her heires. [e] But of the other ſide, if a man give land to a woman and to her heires, *cauſâ matrimonii prælocuti*, though he marrie her, or the woman refuſe, he ſhall not have the lands againe, for it ſtands not with the modeſtie of women in this kind, to aſke advice of learned counſell, as the man may and ought: * and the rather, for that in the caſe of the woman ſhee may averre the cauſe, (for the reaſon aforeſaid) although it be not contained in the deed, yea though the feoffement be made without deed.

[e] 5 E. 2. cui in vita 34. tit. Condition Br. 5 H. 4. 1.

* 12 E. 1. 1. feoffements & faits 114. F. N. B. 205. L. Vid. Sect. 365. Ad faciend' ea intentione, &c. Dyer 138. 7 H. 4. 22. 31 H. 8. tit. Condition 19. Br. Pl. Com. 142. 38 H. 6. 33. 36, 37. Doct. & Stud. li. 2. ca. 54. 27 H. 8. 18. a. 2 Leo. 33.

If a man maketh a feoffement in fee, *ad faciendum*, or *faciendo*, or *eâ intentione*, or *ad effectum*, or *ad propoſitum*, that the feoffee ſhall doe or not do ſuch an act, none of theſe words make the ſtate in the land conditionall, for in judgement of law they are no words of condition; and ſo it was reſolved, *Hil.* 18 *Eliz. in Com. Banco*, in the caſe of a common perſon; but in the caſe of the king the ſaid or the like words doe create a condition, and ſo it is in the caſe of a will of a common perſon, which caſe I myſelfe heard and obſerved.

32 E. 3. Brev. 291. (1 Roll. Abr. 407, 408, 409, 410. Moore 57. 3 Rep. 64. a. 10 Rep. 42. a.)

But for the avoyding of a leaſe for yeares, ſuch preciſe words of condition are not ſo ſtrictly required as in caſe of freehold and inheritance. [f] For if a man by deed make a leaſe of a manor for yeares, in which there is a clauſe (and the ſaid leſſee ſhall continually dwell upon the capitall meſſuage of the ſaid manor, upon paine of forfeiture of the ſaid terme) theſe words amount to a condition.

[f] 7 E. 6. Dier 79. 28 H. 8. Dier 27. a. ſubpœna ſoriſacturæ.

And

And ſo it is if ſuch a clauſe be in ſuch a leaſe, *Quòd non licebit*, to the leſſee, *dare, vendere, vel concedere ſtatum, et ſub pœnâ forisfacturæ*, this amounts to make the leaſe for yeares defeaſible, and ſo it was adjudged in the court of common pleas [g] in queene *Elizabeth's* time; and the reaſon of the court was, that a leaſe for yeares was but a contract, which may begin by word, and by word may be diſſolved.

Quod non licebit. 3 E. 6. Dy. 65, 66. 4 Mar. 138.
[g] Hill. 40. Eliz. Rot. 1610. inter Browne and Ayer. Vid. Pl. Com. 142. Br. and Beſtone's caſe.

[204. b.] Sect. 331.

MES il eſt diverſity perenter ceſt parol (ſi contingat, &c.) *et les parols procheine avantdits. Car ceux parolx* (ſi contingat, &c.) *ne valent riens a tiel condition, ſinon que il ad ceux parolx ſubſequents, Que bien liſt al feoffor et a ſes heires d'entrer, &c. Mes en les caſes avantdits, il ne beſoigne per la ley de mitter tiel clauſe,* (ſcilicet) *que le feoffor et ſes heyres poyent entrer, &c. pur ceo que ils poyent faire ceo per force des parols avantdits, pur ceo que ils impreignont * a eux meſmes en ley un condition,* ſcilicet, *que le feoffor et ſes heires poyent entrer, &c. Uncore il eſt communement uſe en touts tiels caſes avantdits de mitter † les clauſes en les faits,* ſcilicet, *ſi le rent ſoit aderere, &c. que bien lirroit a le feoffor et a ſes heires d'entrer, &c. Et ceo eſt bien fait, a cel intent, pur declarer et expreſſer a les lays gents, que ne ſont appriſes‡ en la ley, ‖ de le manner et le condition de le feoffement, &c. Si come home ſeiſie de terre § leſſa meſme la terre a un auter per fait indent pur terme des ans, rendant a luy certain rent, il eſt uſe de mitter en le fait, que ſi le rent ſoit arere al jour de payment, ou per un ſemaigne ou per un mois, &c. que adonque bien lirroit al leſſor a diſtreyner, &c. ** uncore le leſſor poit diſtreiner de common droit pur le*

BUT there is a diverſitie between this word *ſi contingat, &c.* and the words next aforeſaid, &c. For theſe words, *ſi contingat, &c.* are nought worth to ſuch a condition, unleſſe it hath theſe words following, That it ſhall be lawfull for the feoffor and his heires to enter, &c. But in the caſes aforeſaid, it is not neceſſarie by the law to put ſuch clauſe, *ſcilicet*, that the feoffor and his heires may enter, &c. becauſe they may doe this by force of the words aforeſaid, for that they containe in themſelves a condition, *ſcilicet*, that the feoffor and his heires may enter, &c. Yet it is commonly uſed in all ſuch caſes aforeſaid to put the clauſes in the deeds, *ſcilicet*, if the rent be behind, &c. that it ſhall be lawfull to the feoffor and his heires to enter, &c. And this is well done, for this intent, to declare and expreſſe to the common people, who are not learned in the law, of the manner and condition of the feoffement, &c. As if a man ſeiſed of land letteth the ſame land to another by deede indented for terme of yeares, rendering to him a certaine rent, it is uſed to be put into the deed, that if the rent be behind at the day of payment, or by the ſpace of a weeke or a moneth, &c. that then it ſhall be lawfull

* *a—en* in L. and M. and Roh.
† *les tiels* in L. and M. and Roh.
‡ *en la—de* in L. and M. *de la* in Roh.
‖ *de la manner——le matere* in L. and M. and Roh.
§ *come de franktenement* added in L. and M. and Roh.
** *Et* added in L. and M. and Roh.

le rent arere, &c. coment que tiels parols ne unque fueront miſes en le fait, &c.

lawfull to the leſſor to diſtreine, &c. yet the leſſor may diſtreyne of common right for the rent behind, &c. though ſuch words were not put into the deed, &c.

" Ilz ne beſoigne per la ley de mitter tiel clauſe, &c." Quæ dubitationis cauſâ toliendæ inſeruntur, communem legem non lædunt. Et expreſſio eorum quæ tacitè inſunt, nihil operatur. [205. a.]

" Per un moys, &c." Here albeit the clauſe of diſtreſſe bee added, that if the rent be behind by the ſpace of a weeke or a moneth, that the leſſor may diſtraine, yet he may diſtraine within the weeke or moneth, becauſe a diſtreſſe is incident of common right to every rent ſervice. And the words be in the affirmative, and therefore cannot reſtraine that which is incident of common right.

The other (&c.) in this Section upon that which hath beene ſaid are evident.

Sect. 332.

*ITEM, ſi * feoffment ſoit fait † ſur tiel condition, que ſi le feoffor paya al feoffee a certaine jour, &c. 40 li. d'argent, que adonque le feoffor poit re-entrer, &c. en ceo cas le feoffee eſt appell tenant en morgage, que eſt autant a dire en Francois come mortgage, et en Latin* mortuum vadium. *Et il ſemble que le cauſe pur que il eſt appelle mortgage, eſt, pur ceo que il eſtoyt en aœrouyt ſi le feoffor ‡ voyt payer al jour limitte tiel ſumme ou non: et s'il ne paya pas, donque le terre que il mitter en gage ſur condition de payment de le money, eſt ale de luy a touts jours, et iſſint mort ‖ a luy ſur condition, &c. Et s'il paya le money, donques eſt le gage mort quant a le tenant, &c.*

ITEM, if a feoffment be made upon ſuch condition, that if the feoffor pay to the feoffee at a certain day, &c. 40 pounds of money, that then the feoffor may re-enter, &c. in this caſe the feoffee is called tenant in morgage, which is as much to ſay in French as mortgage, and in Latine *mortuum vadium* (1). And it ſeemeth that the cauſe why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited ſuch ſumme or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and ſo dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

[c] Glanvil. lib. 10. cap. 68. & lib. 13. cap. 26, 27.

" Mortgage" is derived [c] of two French words, viz. *mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latine *mortuum vadium*, or *morgagium*. Now it is called here *mortgage* or *mortuum vadium*, both for the reaſon here expreſſed by *Littleton*, as alſo to diſtinguiſh it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte quod ex ſuis proventubus acquiratur.* As if a man borrow a hundred

* *aſcun* added in Roh. but not in L. and M.

† *a aſcun home* added in Roh. but not in L. and M.

‡ *voyt—poet*, in L. and M. and Roh.

‖ *a luy ſur condition, &c. Et s'il paya le money dont eſt le gage mort*, not in L. and M. no Roh.

(1) [See Note 98.]

a hundred pounds of another, and maketh an eſtate of lands unto him, untill he hath received the ſaid ſumme of the iſſues and the profits of the land, ſo as in this caſe neither money nor land dieth, or is loſt, (whereof *Littleton* hath ſpoken [d] before in this Chaptar) and therefore it is called *vivum vadium*.

[d] Vid. Sect. 327.

[205. b.]

Sect. 333.

*ITEM, ſicome home poit faire feoffment en fee en mortgage, *iſſint home poit faire done en taile en mortgage, et un leas pur terme de vie, ou pur terme des ans en mortgage. † Et touts tiels tenants ſont appels tenants en mortgage, ſolonque les eſtates que ils ont en la terre, &c.*

ALSO, as a man may make a feoffment in fee in morgage, ſo a man may make a gift in tayle in morgage, and a leaſe for terme of life, or for terme of yeares in morgage. And all ſuch tenants are called tenants in morgage, according to the eſtates which they have in the land, &c.

This Section upon that which hath beene ſaid needeth no further explication.

Sect. 334.

ITEM, ſi feoffment ſoit fait en mortgage ſur condition, que le feoffor payera tiel ſumme a tiel jour, &c. ſome eſt ‡ enter eux per lour fait endent accorde et limit, coment que le feoffor moruſt devant le jour de payment, &c. uncore ſi le heire ‖ le feoffor paya meſme le ſumme § de money a meſme le jour a le feoffee, ou tender a luy les deniers, et le feoffee ceo refuſa de receiver, donque poit l' heire entrer en le terre; et uncore le condition eſt, que ſi le feoffour payera tiel ſumme a tiel jour, &c. nient feaſant mention en le condition d' aſcun payment d' eſtre fait per ſon heire, mes pur ceo que le heire ad intereſſe de droit en le condition, &c. et l' entent fuit forſque que les deniers ſerront paies al jour aſſeſſe, &c. et le feoffee n' ad pluis dammage, ſi il ſoit pay per l'heire, que s'il fuit pay per le pier, &c. et pur ceſt cauſe, ſi le heire paya les deniers, ou tendera les

ALSO, if a feoffment be made in morgage upon condition, that the feoffor ſhall pay ſuch a ſumme at ſuch a day, &c. as is betweene them by their deed indented agreed and limited, although the feoffor dyeth before the day of payment, &c. yet if the heire of the feoffor pay the ſame ſumme of money at the ſame day to the feoffee, or tendre to him the money, and the feoffee refuſe to receive it, then may the heire enter into the land; and yet the condition is, that if the feoffor ſhall pay ſuch a ſumme at ſuch a day, &c. not making mention in the condition of any payment to bee made by his heire, but for that the heire hath intereſt of right in the condition, &c. and the intent was but that the money ſhould bee payed at the day aſſeſſed, &c. and the feoffee hath no more loſſe, if it be paid by the heir, than if it were

* *iſſint home poit faire done en taile en mortgage*, not in L. and M. nor Roh.
† *Et* not in L. and M. nor Roh.
‡ *enter—perenter*, L. and M. and Roh.
‖ *de* added in L. and M. and Roh.
§ *de money* not in L. and M. nor Roh.

*les deniers a le jour aſſeſſe, &c. et l'auter ceo refuſa, il poet entrer, &c. Mes ſi un eſtranger de ſa teſte demeſne, que n'ad aſcun intereſſe, &c. voile tender les * avantdits deniers al feoffee a le jour aſſeſſe, le feoffee n'eſt † pas tenus de ceo receiver.*

were paid by the father, &c. therefore if the heire pay the money, or tender the money at the day limited, &c. and the other refuſe it, he may enter, &c. But if a ſtranger of his own head, who hath not any intereſt, &c. will tender the aforeſaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

27 H. 8. 19. b. Lib 8. fol. 91. Frances' caſe. (1 Roll. 426.)

"*QUE le feoffor paiera a tiel jour, &c.*" Albeit conditions bee not favoured, yet they are not alwayes taken literally, but in this caſe the law enableth the heire that was not named to performe the condition for foure cauſes. (1)

(Poſt. 219. b.)

Firſt, Becauſe there is a day limited, ſo as the heire commeth within the time limited by the condition, for otherwiſe he could not doe it, as ſhall be ſaid hereafter in this Chapter.

Secondly, For that the condition deſcends unto the heire, and therefore the law that giveth him an intereſt in the condition, giveth him an abilitie to performe it.

Thirdly, For that the feoffee doth receive no dammage or prejudice thereby (all theſe reaſons are expreſly to be collected out of the words of *Littleton*). And theſe things being obſerved,

Fourthly, The intent and true meaning of the condition ſhall be performed. And where it is here ſaid, that the heire may tender *al jour aſſeſſe*, &c. herein is implyed, that the executors or adminiſtrators of the morgageor, or in default of them the ordinary may alſo tender, as ſhall be ſaid [*f*] hereafter in this Chapter. But what if the condition had beene, if the morgageor or his heires did pay, &c. and hee dyed before the day without heire, ſo as the condition became impoſſible, here it is to be obſerved, that where the condition becommeth impoſſible to be performed by the act of God, as by death, &c. the ſtate of the feoffee ſhall not be avoyded, as ſhall bee ſaid hereafter in this Chapter. And therefore the law here inableth the heire (of whom no mention was made in the condition) to performe the condition, leſt the inheritance ſhould be loſt, wherein divers diverſities are worthy of obſervation. (1)

[206. a.]

[*f*] Vid. Sect. 337.

Firſt, betweene a condition annexed to a ſtate in lands or tenements upon a feoffment, gift in taile, &c. and a condition of an obligation, recognizance or ſuch like. [*g*] For if a condition annexed to lands bee poſſible at the making of the condition, and become impoſſible by the act of God, yet the ſtate of the feoffee, &c. ſhall not bee avoyded. As if a man maketh a feoffment in fee upon condition, that the feoffor ſhall within one yeare goe to the citie of *Paris* about the affaires of the feoffee, and preſently after the feoffor dyeth, ſo as it is impoſſible by the act of God that the condition ſhould be performed, yet the eſtate of the feoffee is become abſolute; for though the condition be ſubſequent to the ſtate, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land ſhould by conſtruction of law be taken from the feoffee, this ſhould work a dammage to the feoffee, for that the condition is not performed which was made for his benefit.

[g] Pl. Com. 456. Wrothe's caſe. 14 H. 7. 3. 15 H. 7. 1. 14 E. 4. 3. 38 H. 6. 2, 3.

* *avantdits* not in L. and M. but in Roh.
† *pas* not in L. and M. but in Roh.

(1) [See Note 97.]
[206. a.]
(1) [See Note 98.]

benefit. And it appeareth by *Littleton*, that it muſt not be to the dammage of the feoffee; and ſo it is if the feoffor ſhall appeare in ſuch a court the next tearme, and before the day the feoffor dyeth, the eſtate of the feoffee is abſolute. [*k*] But if a man be bound by recognizance or bond with condition that he ſhall appeare the next tearme in ſuch a court, and before the day the conuſee or obligor dyeth, the recognizance or obligation is ſaved; and the reaſon of the diverſitie is, becauſe the ſtate of the land is executed and ſettled in the feoffee, and cannot be redeemed back againe but by matter ſubſequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken untill there be a default in the obligor; and therefore in all caſes where a condition of a bond, recognizance, &c. is poſſible at the time of the making of the condition, and before the ſame can be performed, the condition becomes impoſſible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is ſaved. But if the condition of a bond, &c. be impoſſible at the time of the making of the condition, the obligation, &c. is ſingle. And ſo it is in caſe of a feoffment in fee with a condition ſubſequent that is impoſſible, the ſtate of the feoffee is abſolute; but

[206. b.] if the condition precedent be impoſſible, no ſtate or intereſt ſhall grow thereupon. And to illuſtrate theſe by examples you ſhall underſtand. If a man be bound in an obligation, &c. with condition that if the obligor doe goe from the church of St. *Peter* in *Weſtminſter* to the church of St. *Peter* in *Rome* within three hours, that then the obligation ſhall be voyd. The condition is voyde and impoſſible, and the obligation ſtandeth good.

28 H. 8. 25. lib. 5. fo. 22. Laughter's caſe. & 75. 39 H. 3. 5. 17 H. 6. Obligat. 18. 5 El. Dier 222.

And ſo it is if a feoffment be made upon condition that the feoffee ſhall goe as is aforeſaid, the ſtate of the feoffee is abſolute, and the condition impoſſible and voyde.

* If a man make a leaſe for life upon condition that if the leſſee goe to *Rome*, as is aforeſaid, that then he ſhall have a fee, the condition precedent is impoſſible and voyde, and therfore no fee ſimple can grow to the leſſee.

If a man make a feoffment in fee upon condition that the feoffee ſhall re-enfeoffe him before ſuch a day, and before the day the feoffor diſſeiſe the feoffee, and hold him out by force untill the day be paſt, the ſtate of the feoffee is abſolute, for "the feoffor is the cauſe wherefore the condition cannot be performed, and therefore ſhall never take advantage for non-performance thereof. [*i*]" And ſo it is if *A.* be bound to *B.* that *I. S.* ſhall marry *Jane G.* before ſuch a day, and before the day *B.* marry with *Jane*, he ſhall never take advantage of the bond, for that he himſelfe is the meane that the condition could not be performed. And this is regularly true in all caſes.

But it is commonly holden [*k*] that if the condition of a bond, &c. be againſt law, that the bond itſelfe is voyd.

But herein the law diſtinguiſheth between a condition againſt law for the doing of any act that is *malum in ſe*, and a condition againſt law (that concerneth not any thing that is *malum in ſe*) but therefore is againſt law, becauſe it is either repugnant to the ſtate, or againſt ſome maxime or rule in law. And therefore the common opinion is to bee underſtood of conditions againſt law for the doing of ſome act that is *malum in ſe*, and yet therein alſo the law diſtinguiſheth.

[*h*] 15 H. 7. 18. 31 H. 6. barre 60. 18 E. 4. 17. 9 Eliz. 262. Dyer l.b. 5. 22. Laughter's caſe. 38 H. 6. 2.

Fleta lib. 4. cap. 9. & Bracton & Britton ubi ſupra.

(1 Leo. 229. 1 Roll. Abr. 420. Cro. El. 291. 864.) 14 H. 8. 28. 10 H. 7. 22. 4 H. 7. 4. 8 E. 4. 1.

* Pl. Com. Fuller's caſe, 272. (1 Roll. Abr. 418. Poſt. 217. b. 218.) 35 H. 6. tit. barre 262. 37 H. 6. barre 60. 2 E. 3. 9. 9 Eliz. Dyer 262. 23 H. 8. 30. (8th Rep. 83. a. 92. a. Hob. 64.)

[*i*] 4 H. 7. 4. 30 H. 8. Dyer 48. 11 H. 4. 57. in protection. 10 H. 7. 18. (Doc. Pla. 230.)

[*k*] Vid. Bracton, Britton, Fleta ubi ſupra. Bracton lib. 3. fol. 100. 2 H. 4. 9. 8 E. 4. 12. b. 2 E. 4. 2. & 3. 4 H. 7. 4. b. 10 H. 7. 22. 14 H. 8. 23.

42 E. 3. 6. 23. (1 Roll. Abr. 418. Plo. 64. b.) 2 H. 4. 9. (2 Ven. 109.)

tinguiſheth. As if a man be bound upon condition that he ſhall kill *I. S.* the bond is voyde.

(Pl. Com. Browning's caſe 133.)

But if a man make a feoffment upon condition that the feoffee ſhall kill *I. S.* the eſtate is abſolute, and the condition voyd.

(Poſt. Sect. 360. 10 Rep. 38. Hob. 170. 1 Roll. Abr. 419.)

If a man make a feoffment in fee upon condition that he ſhall not alien, this condition is repugnant and againſt law, and the ſtate of the feoffee is abſolute (whereof more ſhall bee ſaid in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heires ſhall not alien, this is good, for he may notwithſtanding alien if he will forfeit his bond that he himſelfe hath made.

7 H. 6. 43. b. 21 H. 6. 33. 21 H. 7. 11. 21 H. 7. 30. 20 E. 4. 8. (Moore 810. Poſt. 225.) Pl. Com. in Browning's caſe 133. a. 27 H. 8.

So it is if a man make a feoffment in fee upon condition that the feoffee ſhall not take the profits of the land, this condition is repugnant and againſt law, and the ſtate is abſolute.

But a bond with a condition that the feoffee ſhall not take the profits is good. If a man be bound with a condition to enfeoffee his wife, the condition is voide and againſt law, becauſe it is againſt the maxime in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et ſic de ſimilibus*, whereof there bee plentifull authorities in our bookes (1).

Vide Sect. 325. (5 Rep. 114.)

"*Tender les deniers al jour aſſeſſe, &c.*" Note, hereby is implyed, that albeit a convenient time before ſun ſet be the laſt time given to the feoffor to tender, yet if he tender it to the perſon of the morgagee at any time of the day of payment, and hee refuſeth it, the condition is ſaved for that time.

"*Il poet entrer, &c.*" And ſo may his heire after his death.

Vide Sect. 401. Hill. 28 Eliz. in Banco Regis inter Watkins & Aſtwick pro terris in Com. Devon. 45 E. 3. tit. Releaſe 28. 32 E. 1. tit. Annuity 51. 33 H. 6. 13. (1 Leo. 34. Moore 222. Poſt 225. b. 225. a.)

"*Mes ſi eſtranger de ſa teſte demeſne, que n'ad aſcun intereſſe, &c. voile tender les avantdits deniers al feoffee al jour aſſeſſe, le feoffee n'eſt pas tenus de ceo receiver.*" *Nota*, by this period and the (*&c.*) it is implyed, that if the morgager dye, his heire within age of 14 yeares (the land being holden in ſocage), the next of kinne to whom the land cannot deſcend being his gardian in ſocage may tender in the name of the heire, becauſe he hath an intereſt as gardian in ſocage. Alſo if the heire be within age of 21 yeares, and the land is holden by knights ſervice, the lord of whom the land is holden may make the tender of his intereſt which he ſhall have when the condition is performed, for theſe in reſpect of their intereſt are not accounted eſtrangers.

But if the heire be an ideot, of what age ſoever, any man may make the tender for him in reſpect of his abſolute diſability, and the law in this caſe is grounded upon charity, and ſo in like caſes.

36 H. 6. tit. barre 166. 33 E. 1. tit. Annuitie 51. 33 E. 3. judgement 254. (Ant. 180. b. Poſt. 245. a. 258. a.)

"*Le feoffee n'eſt pas tenus de ceo receiver.*" And note that *Littleton* ſaith, that he is not bound to receive it at a ſtranger's hand. But if any ſtranger in the name of the morgageor or his heire (without his conſent or privity) tender the money, [207. a.] and the morgagee accepteth it, this is a good ſatisfaction, and the morgageor or his heire agreeing thereunto may re-enter into the land, *omnis ratihabitio retrò trahitur et mandato æquiparatur*. But the morgageor or his heire may diſagree thereunto if he will.

(1) [See Note 99.]

Sect

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ET memorandum que en tiel cas, lou tiel tender de le money eſt fait, &c. et le feoffee de receiver ceo refuſa, per que le feoffor ou ſes heires entront, &c. donque le feoffee n'ad aſcun remedy d'aver le money per le common ley, pur ceo que il ſerra rette ſa follie que il refuſa le money, quant un loyal tendre de ceo fuit fait a luy.

AND be it remembered that in ſuch caſe, where ſuch tender of the money is made, &c. and the feoffee refuſe to receive it, by which the feoffor or his heires enter, &c. then the feoffee hath no remedy by the common law to have this money, becauſe it ſhall be accounted his own folly that he refuſed the money, when a lawful tender of it was made unto him. (1)

"*TENDER de le money eſt fait, &c.*" Here is implyed at the due time and place according to the condition.

"*Entront, &c.*" viz. into the lands or tenements.

"*Donque le feoffee n'ad aſcun remedie d'aver le money per le common ley, &c.*" And the reaſon is, becauſe the money is collaterall to the land, and the feoffee hath no remedy therfore. 8 E. 2. tit. Aſſ. 389. 31 Aſſ. 32.

If an obligation of an hundred pound be made with condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuſeth the ſame, yet in action of debt upon the obligation, if the defendant plead the tender and refuſall, he muſt alſo plead that he is yet ready to pay the money, and tender the ſame in court. But if the plaintife will not then receive it, but take iſſue upon the tender, and the ſame be found againſt him, he hath loſt the money for ever. (2 Roll. Abr. 523. 524. Sid. 13. 364, 365.) 22 H. 6. 39. 21 E. 4. 25. 22 E. 3. 5. Lib. 9. fo. 79. H. Peytoe's caſe (2 Roll. Abr. 523. Dyer 24. b. 25. a. cont.)

If a man be bound in 200 quarters of wheat for deliverie of a 100 quarters, if the obligor tender at the day a 100 quarters, &c. he ſhall not plead *uncore priſt*, becauſe albeit it be parcell of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. And the reaſon wherefore in the caſe of the obligation the ſumme mentioned in the condition is not loſt by the tender and refuſall, is not only for that it is a duty and parcel of the obligation, and therefore is not loſt by the tender and refuſall, but alſo for that the obligee hath remedy by law for the ſame. And in this caſe, *liberata pecunia non liberat offerentem.* 8 E. 2. tit. Aſſ. 389.

But if a man make a ſingle bond, or knowledge a ſtatute or recognizance, and afterwards made a defeaſance for the payment of a leſſer ſum at a day, if the obligor or conuſor tender the leſſer ſumme at the day, and the obligee or conuſee refuſeth it, he ſhall never have any remedy by law to recover it, becauſe it is no parcell of the ſum contained in the obligation, ſtatute, or recognizance, being contained in the defeaſance made at the time or after the obligation, ſtatute, or recognizance. And in this caſe in pleading of the tender and refuſall the partie ſhall not be driven to plead, that he is yet ready to pay the ſame or to tender it in court: neither hath the obligee or conuſee any remedy by law to recover the (2 Saund. 48.) 7 H. 4. 18. 5 Mar. Dier 150. 21 E. 4. 25. 22 E. 3. 5. 38 H. 6. 2. b. 17 Aſſ. pl. 2. 20 E. 4. 1. b. 9 H. 6. 16. 36 H. 6. 26. 15 E. 4. 1. 16 H. 7. 13. 18 E. 3. 58. 7 E. 4. 4, 5.

(1) [See Note 100.]

19 H. 8. 12. 37 H. 8. 1. a. 22 H. 6. 39. tit. Abatement 11. 49 E. 3. 3. 19 H. 6. 12.

the ſumme contained in the defeaſance. [o] And ſo it is if a man make an obligation of 100 pound with condition for the delivery of corne, or timber, &c. or for the performance of an arbitrement or the doing of any act, &c. This is collaterall to the obligation that is to ſay, is not parcell of it, and therefore a tender and refuſall is a perpetual barre (2).

[o] Henry Peytoe's caſe, ubi ſupra. 31 Aſſ. 25. 34 H. 4. 33. 3 H. 6. 8. 3 E. 4.

But if a man be bound to make a feoffement in fee to the obligee, and he make a leaſe and a releaſe to him and his heires, albeit this be a collaterall condition, yet it is well performed, becauſe this amounts in law to a feoffment (3).

17 E. 4. 8. Pl. Com. Fogaſſe's caſe, fo. 6. (Moore 36, 37. Poſt. 236. b.)

Lib. 5. fo. 114, 115. Wade's caſe, lib. 9. fo. 78. (5 Rep. 114. Wade's caſe, 2 Inſ. 579. 742. 3 Inſ. 93.)

"*Money, moneta, legalis moneta Angliæ,*" lawful money of *England*, either in gold or ſilver, is of two ſorts, viz. the *Engliſh* money coyned by the king's authoritie, or forraine coyne by proclamation made currant within the realme. *Coyne, cuna* [207. *dicitur à cudendo*, of coyning of money. In French *coine* ſignifieth a corner, becauſe in ancient time money was ſquare with corners, as it is in ſome countries at this day. Some ſay that *coine dicitur à κοῖνος, id eſt communis, quòd ſit omnibus rebus communis. Moneta dicitur à monendo*, not only becauſe he that hath it, is to be warned providently to uſe it, but alſo becauſe *nota illa de authore et valore admonet. Pecunia dicitur à pecu*, beaſts, *omnes enim veterum divitiæ in animalibus conſiſtebant ;* and it appeareth that in *Homer*'s time there was no money but exchange of cattel, &c. (1)

Ariſtotle, lib. 5. cap. 8. (Cro. Car. 89. Trover and Converſion lies for money out of a bag.)

Nummus, παρὰ τὸ νόμῳ, quia lege ſit non natura. Vide (*) the ſtatute of 9 *H.* 5. of the noble, halfe noble, and farthing of gold, which is the fourth part of a noble, and that is twenty pence.

(*) 2 H. 5. ſtat. 2. cap. 7. (Cro. El. 841.)

Sect. 336.

*ITEM, ſi feoffment ſoit fait ſur tiel condition, que ſi le feoffee paya al feoffor a tiel jour inter eux limit xx l. * adonques le feoffee avera lu terre a luy et a ſes heires ; et ſ'il faile de payer les deniers a le jour † aſſeſſe, ‡ que adonque bien liſt a le feoffor ou a ſes heires d'entrer, &c. et puis devant le jour aſſeſſe, le feoffee venda la terre a un auter, et de ceo fait feoffment a luy, en ceſt caſe ſi le ſecond feoffee voile tender le ſumme de les deniers a le jour aſſeſſe a le feoffor, et le feoffor ceo refuſa, &c. donque le ſecond feoffee ad*

ALSO, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at ſuch a day between them limited twenty pounds, then the feoffee ſhal have the land to him and to his heires; and if he faile to pay the money at the day appointed, that then it ſhall be lawfull for the feoffor or his heires to enter, &c. and afterwards, before the day appointed, the feoffee ſel the land to another, and of this maketh a feoffment to him, in this caſe if the ſecond feoffee wil tender the ſum of money

(2) [See Note 101.]
(3) [See Note 102.]

[207. b.]
(1) [See Note 103.]
* *que* added in L. and M. and Roh.
† *aſſeſſe—&c.* L. and M
‡ *que* added in Roh. but not in L. and M.

ad eſtate en la terre clerement ſans condition. Et la cauſe eſt, pur ceo que le ſecond feoffee avoit intereſt en le condition pur ſalvation de ‖ ſon tenancie. Eſt en ceſt caſe il ſemble que ſi le primer feoffee apres tiel vender de la terre, voile tender le money a le jour aſſeſſe, &c. a le feoffor, ceo ſerra aſſets bone pur ſalvation d'eſtate de le ſecond feoffee, pur ceo que le primer feoffee fuit privie a le condition, et iſſint le tender de aſcun de eux deux eſt aſſets bone, &c.

money at the day appointed to the feoffor, and the feoffor refuſeth the ſame, &c. then the ſecond feoffee hath an eſtate in the land cleerely without condition. And the reaſon is, for that the ſecond feoffee hath an intereſt in the condition for the ſafegard of his tenancy. And in this caſe it ſeemes that if the firſt feoffee after ſuch ſale of the land, will tender the money at the day appointed, &c. to the feoffor, this ſhall be good enough for the ſafegard of the eſtate of the ſecond feoffee, becauſe the firſt feoffee was privie to the condition, and ſo the tender of either of them two is good enough, &c.

"*ET s'il faile de paier les deniers, &c.*"

If a man make a feoffment of lands, to have and to hold to him and his heires, upon condition, that if the feoffee pay to the feoffor at ſuch a day twenty pounds, that then the feoffee ſhall have the lands to him and his heires, if the condition had not proceeded further, it had been void, for that the feoffee had a fee ſimple by the firſt words, and therefore the words ſubſequent (2) are materially added. (and if he faile to pay the money, &c.)

13 E. 3. Condic. 8. 13 E. 3. ibid. 10. 12 Aſſ. 5. Plo. 481. (5 Rep. 117.) Li. 5. fo. 96, 97. Goodale's caſe.

"*Le ſecond feoffee voile tender le ſumme des deniers, &c.*"

Albeit the ſecond feoffee bee not named in the condition, yet ſhall hee tender the ſumme becauſe he is privie in eſtate, and in judgment of law hath an eſtate and intereſt in the condition, (as *Littleton* here ſaith) for the ſalvation of his tenancy. *Vid.* Sect. 334. And note, he that hath intereſt in the condition on the one ſide, or in the land on the other, may tender.

(8 Rep. 42. b.) (2 Cro. 9. 245.) Li. 5. fo. 114, 115. Wade's caſe.

And it is to bee obſerved alſo, that the feoffee may tender any money that is currant within the realme, albeit it be forreine coine, ſo as it be currant by act of parliament, or by the king's proclamation, (3) as hath beene ſaid.

[208. a.] "*Tender le ſumme.*" The feoffee may tender the money in purſes or bagges, without ſhewing or telling the ſame, for he doth that which he ought, viz. to bring the money in purſes or bagges, which is the uſuall manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it.

"*A primer feoffee.*" Here it appeareth, that the firſt feoffee may, notwithſtanding his feoffment, pay the money to the feoffor, becauſe he is partie and privie to the condition, and by his tender may ſave the eſtate of his feoffee, which in all good dealing he ought to doe. (1)

‖ *ſon—le* L. and M. and Roh.

(2) See note 1. fol. 216.

(3) [See Note 104.]

[208. a.]

(1) [See Note 105.]

Sect. 337.

ITEM, ſi feoffement, ſoit fait ſur condition, que ſi le feoffor paya certaine ſumme d'argent al feoffee, adonques bien lirroit a feoffor et a ſes heires d entrer: en ceſt caſe ſi le feoffor devie devant le payment fait, et l'heire voile tender al feoffee les deniers, tiel tender eſt voyd, pur ceo que le temps deins quel ceo doit eſtre fait eſt paſſe. Car quaunt le condition eſt, que ſi le feoffor paya les deniers al feoffee, &c. ceo eſt tant a dire, que ſi le feoffor durant ſa vie paya les deniers al feoffee, &c. et quant le feoffor moruſt, donques le temps de le tender eſt paſſe. Mes auterment eſt lou un jour de payment eſt limit, et le feoffor devie devaunt le jour, donque poet le heire tender les deniers come eſt avantdit, pur ceo que le temps de le tender ne fuyt paſſe per le mort del feoffor. Auxy il ſemble, ‡ que en tiel caſe lou le feoffor devy devant le jour de payment, ſi les executors de le feoffor tendront les deniers al feoffee al jour de payment, cel tender eſt aſſets bone; et ſi le feoffee ceo refuſe, † les heires de feoffor poient entrer, &c. Et le cauſe eſt, pur ceo que les executors repreſentont le perſon lour teſtator, &c.*

ALSO, if a feoffment bee made upon condition, that if the feoffor pay a certaine ſumme of money to the feoffee, then it ſhal be lawfull to the feoffor and his heires to enter: in this caſe if the feoffor die before the payment made, and the heire wil tender to the feoffee the money, ſuch tender is void, becauſe the time within which this ought to be done is paſt. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to ſay, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor dyeth, then the time of the tender is paſt. But otherwiſe it is where a day of payment is limited, and the feoffor die before the day, then may the heire tender the money as is aforeſaid, for that the time of the tender was not paſt by the death of the feoffor. Alſo it ſeemeth, that in ſuch caſe where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuſe it, the heires of the feoffor may enter, &c. And the reaſon is, for that the executors repreſent the perſon of their teſtator, &c. (1)

[a] 14 H. 7. 31. 15 H. 7. 1. (Ant. 47. Poſt. 219. a. 2 Cro. 244.) (2 Co. 70.)

THIS diverſitie is plaine and evident, and agreeth with [a] our books, and yet ſomewhat ſhal be obſerved hereupon: for here it appeareth, that ſeeing no time is limited, the law doth appoint the time, and that is during the life of the feoffor. Wherein divers diverſities are worthy the obſervation:

44 E. 3. 9. 33 H. 6. 45. & 48. b. 4 E. 4. 29. 9 E. 4. 22.

Firſt, betweene this caſe that *Littleton* here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a ſumme of money where no time is limited: for in ſuch a condition of a bond the money is to be payd preſently, that is, in convenient time. [b] And yet in caſe of a condition of a bond there is a

15 E. 4. 30. 21 E. 4. 38. b. 9 H. 7. 17. b. 10 H. 7. 15. 14 H. 8. 21. a. & 29. b.

[b] Lib. 6. fol. 30, 31. Boothie's caſe. 33 H. 6. 47, 48.

diverſitie

* *&c.* added in L. and M. and Roh. [208. b.]

‡ *que* not in L. and M. and Roh.

† *donques* added in L. and M. and Roh.

(1) [See Note 106.]

2 diverſitie betweene a condition of an obligation, which concernes the doing of a tranſitorie act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to bee performed preſently; that is, in convenient time; and when by the condition of the obligation the act that is to bee done [208. b.] to the obligee is of his owne nature locall, for there the obligor (no time being limited) hath time during his life to performe it, as to make a feoffment, &c. if the obligee doth not 3 haſten the ſame by requeſt. In caſe where the condition of the obligation is locall, there is alſo a diverſitie, when the concurrence of the obligor and the obligee is requiſite, (as in the ſaid caſe of the feoffment) and when the obligor may performe it in the abſence of the obligee, as to knowledge ſatisfaction in the court of king's bench, [*] although the knowledge of ſatisfaction is locall, yet becauſe he may doe it in the abſence of the obligee, he muſt doe it in convenient time, and hath not time during his life.

(1 Roll. Abr. 436.)

(6 Rep. 31. Boothie's caſe. Poſt. 210. b.)

(2 Roll. Abr. 436, 437.)

[*] Boothie's caſe, ubi ſupra. (Doc. Pla. 269. 457.)

4 Another diverſity is, where the condition concerneth a tranſitory or locall act, and is to be performed to the feoffee or obligee, and where it is to be performed to a ſtranger: as if *A.* be bound to *B.* to pay ten pounds to *C. A.* tenders to *C.* and he refuſeth, the bond is forfeited, as in this Section ſhall be ſaid more at large.

5 Another diverſitie is betweene a condition of an obligation, and a condition upon a feoffment, where the act that is locall is to be done to a ſtranger, and where to the obligee or feoffor himſelfe. As if one make a feoffment in fee, upon condition that the feoffee ſhall infeoffe a ſtranger, and no time limited, the feoffee ſhall not have time during his life to make the feoffment, for then he ſhould take the profits in the meane time to his owne uſe, which the eſtranger ought to have, and therefore hee ought to make the feoffment as ſoone as conveniently he may; and ſo it is of the condition of an obligation. But if the condition be, that the feoffee ſhall reinfeoffe the feoffor, there the feoffee hath time during his life, for the privitie of the condition between them, unleſſe he be haſtened by requeſt, as ſhall bee ſaid hereafter.

(Vide ant. Sect. 324.) Boothie's caſe, li. 6. fo. 31. li. 2. fo. 79. b. Seignior Cromwell's caſe. 44 E. 2. 9. 21 E. 4. 41. 2 E. 4. 3, 4. 19 H. 6. 67. 73. 76. 4 E. 4. 4. b. 26 H. 8. 9. b. (2 Rep. 59. 219. b.)

6 Another diverſitie is, when the obligor or feoffor is to enfeoffe a ſtranger, as hath been ſaid, and when a ſtranger is to enfeoffe the feoffee or obligee: as if *A.* enfeoffe *B.* of *Black Acre*, upon condition that if *C.* enfeoffe *B.* of *White Acre*, *A.* ſhall re-enter, *C.* hath time during his life, if *B.* doth not haſten it by requeſt, and ſo of an obligation.

(Vide poſt. Sect. 352, 353, 354.)

7 But in ſome caſes albeit the condition be collaterall, and is to be performed to the obligee, and no time limited, yet in reſpect of the nature of the thing the obligor ſhall not have time during his life to performe it. As if the condition of an obligation bee, to grant an annuitie or yeerely rent to the obligee during his life, payable yearely at the feaſt of *Eaſter*, this annuity or yeerely rent muſt be granted before *Eaſter*, or elſe the obligee ſhall not have it at that feaſt during his life, *et ſic de ſimilibus;* and ſo was it reſolved by the judges [*] of the common pleas in the argument of *Andrews's* caſe, which I my ſelfe heard.

14 E. 3. Det. 138. li. 2. fo. 80. Seignior Cromwell's caſe.

[*] Vid. Dyer. 14 El. 311.

8 Laſtly, When the obligor, feoffor, or feoffee is to doe a ſole act or labour, as to goe to *Rome*, *Jeruſalem*, &c. in ſuch and the like [209. a.] caſes, the obligor, feoffor, or feoffee, hath time during his life, and cannot be haſtened by requeſt. And ſo it is if a ſtranger to the obligation or feoffment were to doe ſuch an act, he hath time to doe it at any time during his life.

(6 Rep. Boothie's caſe.)

(Ant. 206. a.) Lib. 5. fol. 96, 97. Goudale's caſe. [f] Vid. Sect. 334. (See Henſloe's ca. 9 Rep. 36. b.)

"*Si les executors del feoffor tendront, &c.*" So as now it appeareth that either the heire of the feoffor, or his executors, may (when a day is limited) pay the money; and ſo alſo may the adminiſtrator of the feoffor doe, if the feoffor dye inteſtate [f]; and this may the ordinarie doe if there be neither executor nor adminiſtrator as hath beene ſaid.

"*Et le feoffee refuſe, les heires del feoffor poient entrer, &c.*" *Note*, a tender by the executors or adminiſtrators, and a refuſall, doth give the heire of the feoffor a title of entrie. And here by this (&c.) is a diverſitie implyed, when a tender and refuſall ſhall give a third perſon title of entrie.

33 H. 6. 16, 17. 36 H. 6. 8. 2 E. 4. 2, 3. 15 E. 4. 5, 6. 22 E. 4. 13. 32 E. 3. barre 264. 7 E. 3. 29. 9 H. 7. 17. 10 H. 7. 14. b. 35 H. 8. Dier 56. lib. 5. fol. 25. Lambe's caſe. (5 Rep. 23. 1 Roll. Abr. 452. Poſt. 211. a. Ant. 206. a.)

If a man be bound to *A.* in an obligation with condition to enfeoffe *B.* (who is a meere ſtranger) before a day, the obligor doth offer to enfeoffe *B.* and he refuſeth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refuſall cannot ſatisfie the condition, becauſe no feoffment is made; but if the feoffment had beene by the condition to be made to the obligee, or to any other for his benefit or behooſe, a tender and refuſall ſhall ſave the bond, becauſe he himſelfe upon the matter is the cauſe wherefore the condition could not be performed, and therefore ſhall not give himſelfe cauſe of action. But if *A.* be bound to *B.* with condition that *C.* ſhall enfeoffe *D.* in this caſe if *C.* tender, and *D.* refuſe, the obligation is ſaved, for the obligor himſelfe undertaketh to doe no act, but that a ſtranger ſhall enfeoffe a ſtranger. And it is holden in bookes [h] that in this caſe it ſhall be intended, that the feoffment ſhould be made for the benefit of the obligee. Some to reconcile the bookes ſeeme to make a difference between an expreſſe refuſall of the ſtranger, and a readineſſe of the obligor at the day and place to make performance, and the abſence of the ſtranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themſelves are neceſſary to be ſeene; for the law herein is, as it hath beene before declared.

[h] 8 E. 4. 14. 2 E. 4. ubi ſupra.

12 H. 6. 34. (2 Rep. 59. 1 Roll. Abr. 452. 1 Rep. 133. b.)

If *I.* enfeoffee one in fee upon condition to enfeoffe *I. S.* and his heires, the feoffee tenders the feoffment to *I. S.* and he refuſeth it, the feoffor may re-enter, for by the expreſſe intent of the condition, the feoffee ſhould not have and retaine any benefit or eſtate in the land, but is as it were an inſtrument to convey over the land.

2 E. 4. Entrie conge 25.

But in that caſe, if the condition were to make a gift in tayle to *I. S.* and he refuſeth it, and a tender and refuſall is made, there the feoffor ſhall not re-enter, for that it was intended that the feoffee ſhould have an eſtate in the land. And ſo it is if a feoffment bee made upon condition that the feoffee ſhall grant a rent charge to a ſtranger, if the feoffee tender the grant and he refuſeth, the feoffor ſhall not re-enter, becauſe the feoffee was to retaine the land; which points are worthy of due obſervation.

Here in the caſe of *Littleton*, when the executors make the tender, and the feoffee refuſeth, albeit the heire be a third perſon, yet is he no ſtranger, but he and the executors alſo are privies in law.

(Poſt. 209. b.)

"*Le perſon del teſtator, &c.*" This is to bee underſtood concerning goods and chattels either in poſſeſſion or in action, and the executor doth more actually repreſent the perſon of the teſtator, than the heire doth the perſon of the anceſtor. For if a man bindeth

bindeth himſelfe, his executors are bound though they bee not named, but ſo it is not of the heire: furthermore, here the adminiſtrators and the ordinary alſo are implyed, as before hath beene ſaid (1). (8 Eliz. 236.)

Sect. 338.

ET nota, que en touts caſes de condition de payment de certaine ſumme en groſſe touchant terres ou tenements, ſi loyall tender ſoit un foits refuſe, celuy que duiſſoit tender le money eſt de ceo aſſouth, et pleinment diſcharge pur touts temps apres.

AND note, that in all caſes of condition for payment of a certaine ſumme in groſſe touching lands or tenements, if lawfull tender be once refuſed, he which ought to tender the money is of this quit, and fully diſcharged for ever afterwards.

THIS is to be underſtood, that he that ought to tender the money is of this diſcharged for ever to make any other tender; but if it were a dutie before, though the feoffor enter by force of the condition, yet the debt or dutie remayneth. As if *A.* borroweth a hundred pound of *B.* and after mortgageth land to *B.* upon condition for payment thereof; if *A.* tender the money to *B.* and he refuſeth it, *A.* may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if *A.* without any loane, debt, or dutie preceding infeoffe *B.* of land upon condition for the payment of a hundred pounds to *B.* in nature of a gratuitie or gift; in that caſe if he tender the hundred pound to him according to the condition, and he refuſeth it, *B.* hath no remedie therefore; and ſo is our author in this and his other caſes of like nature to be underſtood. Vide Sect. ſequent. [209. b.] (9 Rep. 79. a.)

Sect. 339.

ITEM, ſi le feoffee en mortgage devant le jour de payment que ſerroit fait a luy, face ſes executors et decie, et ſon heire enter en le terre come il devoit, &c. il ſemble en ceſt cas que le feoffor doit payer le money al jour aſſeſe al executors, et nemy al heire le feoffee, pur ceo que le money al commencement trenchaſt al feoffee en maner come un dutie, et ſerra entendue que l'eſtate fuit fait pur cauſe de le prompter de le money per le feoffee, ou pur cauſe d'auter dutie; et pur ceo le payment ne ſerra fait al heire, come il ſemble, mes les parols del condition poyent eſtre tiels, que le payment ſerra fait al heire. Come ſi le

ALSO, if the feoffee in morgage before the day of payment which ſhould be made to him, makes his executors and die, and his heire entreth into the land as he ought, &c. it ſeemeth in this caſe that the feoffour ought to pay the money at the day appointed to the executors, and not to the heire of the feoffee, becauſe the money at the beginning trenched to the feoffee in manner as a dutie, and ſhall be intended that the eſtate was made by reaſon of the lending of the money by the feoffee, or for ſome other dutie; and therefore the payment ſhall not be made to the heire, as it ſeemeth, but the words

(1) [See Note 107.]

come il ſemble, mes les parols del condition poyent eſtre tiels, que le payment ſerra fait al heire, not in L. and M. nor Roh.

*le condition fuit, que ſi le feoffor paya al feoffee, ou a ſes heires, tiel ſumme a tiell jour, &c. la apres la mort le feoffee s'il moruſt devant le jour limit, * le payment doit eſtre fait al heir al jour aſſeſſe, &c.*

words of the condition may be ſuch, as the payment ſhall be made to the heire. As if the condition were, that if the feoffor pay to the feoffee or to his heires ſuch a ſumme at ſuch a day, &c. there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heire at the day appointed, &c.

18 E. 4 fol. 18. lib. 5. fol. 98. Goodale's caſe. 19 H. 6 54. 20 E. 3. Account Pl. 70. (5 Rep. 117.)

"*PAIERA tiel ſumme a tiel jour, &c.*" Here is implyed, that this payment ought to bee reall, and not in ſhew or appearance. For if it be agreed betweene the feoffor and the executors of the feoffee that the feoffor ſhall pay to the executors but part of the money, and that yet in appearance the whole ſumme ſhall be paid, and that the reſidue ſhall bee repaid, and accordingly at the day and place the whole ſumme is paid, and after the reſidue is repaid, this is no performance of the condition, for the ſtate ſhall not be diveſted out of the heire, which is a third perſon, without a true and effectuall payment, and not by a ſhadow or colour of payment, and the agreement precedent doth guide the payment ſubſequent.

(5 Rep. 96.)

(Ant. 209. a. 9 Rep. 39.)

And by this Section alſo it appeareth, that the executors do more repreſent the perſon of the teſtator, then the heire doth to the auncеſtor; for though the executor be not named, yet the law appoints him to receive the money, but ſo doth not the law [210. a.] appoint the heire to receive the money unleſſe he be named.

"*Doit eſtre fait al heire al jour aſſeſſe, &c.*" And here it alſo appeareth, that if the condition upon the morgage be to pay to the morgagee or his heires the money, &c. and before the day of payment the morgagee dieth, the feoffor cannot pay the money to the executors of the morgagee: for *Littleton* ſaith that in this caſe the payment ought to be made to the heire. *Et in hoc caſu deſignatio unius perſonæ eſt excluſio alterius, et expreſſum facit ceſſare tacitum*; and the law ſhall never ſeeke out a perſon, when the parties themſelves have appointed one. But if the condition be to pay the money to the feoffee his heires or executors, then the feoffor hath election to pay it either [*m*] to the heire or executors.

Vid. lib. 5. fo 96. Goodale's caſe. Dier 2 Eliz. 181. 44 E. 3. 1. b. (Ant. 47. a.)

[*m*] 12 E. 8. Condition 8. & 10. (8 Rep. 73.)

If a man make a feoffment in fee upon condition that the feoffee ſhall pay to the feoffor his heires or aſſignes 20 pound at ſuch a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the ſame either to the heire or to the executors, for they are his aſſignes in law to this intent. But if a man make a feoffment in fee upon condition that if the feoffor pay to the feoffee his heires or aſſignes 20 pound before ſuch a feaſt, and before the feaſt the feoffee maketh his executors and dyeth, the feoffor ought to pay the money to the heire, and not to the executors, for the executors in this caſe are no aſſignees in law; and the reaſon of this diverſitie is this, for that in the firſt caſe the law muſt of neceſſitie finde out aſſignes, becauſe there cannot be any aſſignes in deed, for the feoffor hath but a bare condition and no eſtate in the land which he can aſſigne over. But in the other caſe the feoffee hath an eſtate in the land which he may aſſigne over; and where there may bee aſſignees

(1 Roll. Abr. 421.)

(Hob. 9.)

* *donques* added in L. and M. and Roh.

ſignees in deed, the law ſhall never ſeeke out or appoint any aſſignes in law. And albeit the feoffee made no aſſignment of the eſtate, yet the executors cannot be aſſignees, becauſe aſſignes were onely intended by the condition to be aſſignees of the eſtate; and ſo was it reſolved (*) *Mich.* 23 & 24 *Eliz.* by the two chiefe juſtices in the court of wards betweene *Randall* and *Browne*, which I obſerved.

But if the condition be to pay the money to the feoffee his heires or aſſignes, and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the firſt feoffee or to the ſecond feoffee; and ſo if the firſt feoffee dyeth, the feoffor may either pay the money to the heire of the firſt feoffee or to the ſecond feoffee, for the law will not enforce the feoffor to take knowledge of the ſecond feoffment, nor of the validity thereof, whether the ſame be effectuall or not, but at his pleaſure, and the firſt feoffee and his heires are expreſly named in the condition (1).

27 H. 8. 2. 3 & 4. Ph. & Mar. 140. a.

(*) Mic. 23. & 24 Eliz. in curia Wardorum inter Randal & Browne. Vid. 2 Eliz. Dier 181. Pl. Com. Chapman's caſe 186. 288. Vid. Goodale's caſe lib. 5. fo. 96, 97. 17 Aſſ. pl. 2. Goodale's caſe ubi ſupra.

(Mo. 243. Ant. 208. a.)

Sect. 340.

*ITEM, † ſur tiel caſe de feoffment en mortgage, queſtion ad eſte demaunde en quel lieu le feoffour eſt tenus ‡ de tender les deniers a le feoffee al jour aſſeſſe, &c. Et aſcuns ont dit, que ſur la terre iſſint § tenus en mortgage, pur ceo que le condition eſt dependant ſur le terre. Et ont dit ‖ que ſi le feoffor ſoit ¶ ſur le terre la preſt a paier le money al feoffee a le jour aſſeſſe, et le feoffee adonque ne ſoit pas la, † adonque le feoffor eſt aſſouth et excuſe de payment de le mony, pur ceo que nul default eſt en luy. Mes il ſemble a aſcuns que la ley eſt contrary, et que default eſt en luy; car il eſt tenus de querer le feoffee s'il ſoit adonque en ** aſcun auter lieu deins le roialme de Engleterre. Come ſi home ſoit oblige en un obligation de 20 li. ſur condition endorce ſur meſme l'obligation, que s'il paya a celuy a que l'obligation eſt fuit a tiel jour 10 li. †† adonque l'obligation de 20 li. perdra ſa force, et ſerra tenus per nul; en ceſt cas il covient a celuy que fiſt obligation*

ALSO, upon ſuch caſe of feoffment in morgage, a queſtion hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And ſome have ſaid, upon the land ſo holden in morgage, becauſe the condition is depending upon the land. And they have ſaid that if the feoffor be upon the land there ready to pay the money to the feoffee at the day ſet, and the feoffee bee not then there, then the feoffor is quit and excuſed of the payment of the money, for that no default is in him. But it ſeemeth to ſome that the law is contrary, and that default is in him; for he is bound to ſeeke the feoffee if hee bee then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorſed upon the ſame obligation, that if he pay to him to whom the obligation is made at ſuch a day 10 pound, then the obligation of 20 pound

(1) [See Note 108.]

† *ſur—en* L. and M. and Roh.

‡ *de—a*, L. and M. and Roh.

§ *tenus* not in L. and M.

‖ *que* not in L. and M. but in Roh.

¶ *ſur le terre la*, not in L. and M. nor Roh.

† *que* added in L. and M. and Roh.

** *aſcun—un*, L. and M. and Roh.

†† *que* added in L. and M. and Roh.

gation de querer celuy a que l'obligation eſt fait, s'il ſoit deins Engleterre, et al jour aſſeſſe de tendre a luy les dits 10 *li. auterment il forfeitera la ſumme de* 20 *li. compriſe deins l'obligation,* ‖ &c. *Et iſſint il ſemble en l'auter cas,* &c. *Et coment que aſcuns ont dit, que le condition eſt dependant ſur la terre, uncore ceo ne prove que le feaſans de le condition d'eſtre performe, covient eſtre fait ſur la terre,* &c. *nient plus que ſi le condition fuit que le feoffor ferra a tiel jour,* &c. *un eſpecial corporall ſervice al feoffee, nient noſmant le lieu ou tiel corporal ſervice ſerra fait. En tiel cas le feoffor doit faire tiel corporal ſervice al jour limitte al feoffee, en quecunque lieu d' Engleterre que le feoffee eſt, s'il voile aver advantage de le condition,* &c. *Iſſint il ſemble en l'auter cas. Et il ſemble a eux que il ſerroit pluis properment dit, que l'eſtate de la terre eſt dependant ſur la condition,* * *que* † *a dire que le condition eſt dependant ſur la terre,* &c. Sed quære, &c.

pound ſhall loſe his force, and bee holden for nothing; in this caſe it behooveth him that made the obligation to ſeek him to whom the obligation is made if he be in England, and at the day ſet to tender unto him the ſaid 10 pound, otherwiſe he ſhall forfeit the ſumme of 20 pound compriſed within the obligation, &c. And ſo it ſeemeth in the other caſe, &c. And albeit that ſome have ſaid that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at ſuch a day ſhall do ſome ſpeciall corporall ſervice to the feoffee, not naming the place where ſuch corporall ſervice ſhall be done. In this caſe the feoffor ought to do ſuch corporall ſervice at the day limited to the feoffee, in what place ſoever of England that the feoffee bee, if he will have advantage of the condition, &c. So it ſeemeth in the other caſe. And it ſeemes to them that it ſhall bee more properly ſaid, that the eſtate of the land is depending upon the condition, then to ſay that the condition is depending upon the land, &c. *Sed quære, &c.*

(*) Vid. Sect. 170. 302. 375.
[a] 8 E. 4. 4. & 14. 11 H. 4. 62. 17 Aſſ. p. 2. 17 E. 3. 2. 21 H. 7 Keyl-way 74. 16 Eliz. Dier 3. 7. lib. 4. fo. 73. in Borough's caſe. 21 E. 4. 6. (5 Rep. 95. 2 Cro. 423. 3 Cro. 688.) 18 E. 4. 2. 19 R. 2. Det. 178. (Ant. 206. b. 207. a.) (1 Roll. 433.) (Ant. 208.)
[b] 2 E. 4. 3.

" *ITEM, ſur tiel caſe de feoffment en morgage, queſtion ad eſte demande,* &c." Here and in other places, that I may ſay once for all, where *Littleton* maketh a doubt, and ſetteth down ſeverall opinions and the reaſons, he ever ſetteth downe (*) the better opinion and his owne laſt, and ſo he doth here. [a] For at this day this doubt is ſettled, having beene oftentimes reſolved, that [210. b.] ſeeing the money is a ſumme in groſſe, and collaterall to the title of the land, that the feoffor muſt tender the money to the perſon of the feoffee according to the later opinion, and it is not ſufficient for him to tender it upon the land; otherwiſe it is of a rent that iſſueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or ſuch like, the obligor or feoffor is not bound to carry the ſame about and ſeeke the feoffee, but the obligor or feoffor before the day muſt goe to the feoffee, and know where he will appoint to receive it, and there it muſt bee delivered. And ſo note a diverſitie betweene money and things ponderous, or of great waight. If the condition of a bond or feoffment be to make a feoffment, there it is ſufficient [b] for him to tender it upon the land, becauſe the ſtate muſt paſſe by liverie.

" *Deins*

‖ &c. not in L. and M. but in Roh.

* &c. added L. and M. and Roh.
† *eſt a tant*, added L. and M. and Roh.

" *Deins le roialm d'Engleterre* (1)." For if he be out of the realme of *England* hee is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

" *Un especiall corporall service al feoffee.*" This is a diversity betweene a rent issuing out of land, and a corporall service issuing out
[211. a.] of land, for it sufficeth (as hath beene said) that the rent bee tendered upon the land, (1) out of which it issueth. But homage or any other special corporal service must be done to the person of the lord, and the tenant ought by the law of conveniency to seeke him to whom the service is to bee done in any place within *England*. 21 E. 3 10. 20 H. 6. 31. 27 E. 3. 34. 21 Ass. 13. 7 E. 4. 4. 21 E. 4. 17.

20 E. Avowrie 113. 45 E. 3. 9. 46 E. 3. Barre 216. Mich. 22. & 23 Eliz. in Banke le Roy, which I myselfe heard and observed. 19 Eliz. Dier 354. Lib. 8. fol. 92. in France's case. (Cro. Jac. 9)

If a man be bound to pay twenty pound at any time during his life at a place certaine, the obligor cannot tender the money at the place when he will, for then the obligee should bee bound to perpetuall attendance, and therefore the obligor in respect of the incertainty of the time must give the obligee notice that on such a day at the place limited, he wil pay the money, and then the obligee must attend there to receive it: for if the obligor then and there tender the money, he shall save the penaltie of the bond for ever. (1 Roll. Abr. 453. Ant. 206. 210.)

The same law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pound at such a place certaine, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for without such notice as is aforesaid, the tender will not be sufficient. But in both these cases if at any time the obligor or feoffor meete the obligee or feoffee at the place, he may tender the money. 18 Eliz. Dyer 354. (2 Rep. 59. 3 Rep. 64.) (8 Rep. 92. Post. Sect. 353. 2 Cro. 9, 10.

If *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* on such a day, *C.* must give notice to *D.* thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seeke *D.* and to give him notice. (Hob. 51. 1 Roll. Abr. 463. 2 Cor. 9.)

" *De tender*," or *tendre*, is a word common both to the *English* and *French*, in *Latine offerre*; and in that sense, and with that *Latyn* word it is alwayes used in the common law. *Vide* Sect. 514, the tender of the halfe marke. And before, Sect. 333, 334, 337. (2 E. 4. 8. & 4.)

[211. b.]

Sect. 341.

*MES si feoffment en fee soit fait, reservant al feoffor un annual rent, et pur default de payment un re-entrie, &c. en ceste case il ne besoigne * le tenant a tender le rent, quaunt il est arere, forsque sur le terre, pur ceo que ceo est rent issuant hors de la terre, que† est*

BUT if a feoffment in fee bee made, reserving to the feoffor a yerely rent, and for default of payment a re-entrie, &c. in this case the tenant needeth not to tender the rent, when it is behind, but upon the land, because this is a rent issuing out of

(1) [See Note 109.]
[211. a.]
(1) [See Note 110.]

* *a* added L. and M. and Roh.
† *ce* added L. and M. and Roh.

eſt rent ſecke. Car ſi le feoffor ſoit ſeiſie un foits de ceſt rent, et puis il vient ſur la terre, &c. et le rent luy ſoit denie, il poet aver aſſiſe de Novel Diſſeiſin. Car coment que il poet entrer per cauſe de le condition enfreint, &c. un ore il poet eſlier ſcilicet, de relinquiſher ſon entrie, ou d'aver un aſſiſe, &c. Et iſſint eſt diverſitie, quant al tender de le rent que eſt iſſuant hors de la terre, et del tender d'auter ſumme en groſſe, que ne paſſe iſſuant hors d'aſcun terre.

of the land, which is a rent ſecke. For if the feoffor bee ſeiſed once of this rent, and after hee commeth upon the land, &c. and the rent is denied him, he may have an aſſiſe of *Novel Diſſeiſin*. For albeit he may epter by reaſon of the condition broken, &c. yet hee may chooſe either to relinquiſh his entrie, or to have an aſſiſe, &c. And ſo there is a diverſitie, as to the tender of a rent which is iſſuing out of the land, and of the tender of another ſumme in groſſe, which is not iſſuing out of any land.

HERE the diverſitie appeareth betweene a ſumme in groſſe, and a rent iſſuing out of the land, as hath beene touched before.

"*Uncore il poet eſlier*, ſcilicet, *de relinquiſher ſon entry, ou de aver un aſſiſe.*"

(Ant. 145. a.) 14 E. 3. Entre congeab e 45. 14 Aſſ. 11. 45 Aſſ. 5. 6 H. 7. 3. 17 E. 3. 73. Pl. Com. 133. 22 H. 6. 57. (5 Rep. 64, 65.) (1 Roll. Abr. 475. Poſt. 373. a. Noy. 7.)

Here it appeareth, that if the condition be broken for non payment of the rent, yet if the feoffor bringeth an aſſiſe for the rent due at that time, he ſhal never enter for the condition broken, becauſe he affirmeth the rent to have a continuance, and thereby wayveth the condition. And ſo it is if the rent had had a clauſe of diſtreſſe annexed unto it, if the feoffor had deſtrained for the rent, for non payment whereof the condition was broken, he ſhould never enter for the condition broken, but he may receive that rent and acquite the ſame, and yet enter for the condition broken. But if he accept a rent due at a day after, hee ſhall not enter for the condition broken, becauſe he thereby affirmeth the leaſe to have a continuance (1).

(1 Roll. Abr. 445, 446.) (2 Cro. 13, 14.)

Sect. 342.

*ET pur ceo il ſerra bone et ſure choſe pur celuy que voet faire tiel feoffment en mortgage, de mitter un eſpecial lieu lou les deniers ſeront payes, et le pluis eſpeciall que eſt mis, le melior eſt pur le feoffor. Sicome A. infeoffe B. a aver a luy et a ſes heires, ſur tiel condition, que ſi A. paya a B. en le Feaſt de Saint Michael. L'Archangell procheine a vener, en eſgliſe cathedrall de Paules en Londres, deins quater heures procheine devant le heure de noone de meſme le Feaſt, a le Rood loſt de * le Rood*

AND therefore it wil be a good and ſure thing for him that will make ſuch feoffment in morgage, to appoint an eſpecial place (2) where the money ſhall be payd, and the more ſpeciall that it bee put, the better it is for the feoffor. As if *A.* infeoffe *B.* to have [212. a.] to him and to his heires, upon ſuch condition, that if *A.* pay to *B.* on the Feaſt of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour

(1) [See Note 111.]
(2) [See Note 112.]

* *le Rood de le*, not in L. and M. nor Roh.

Rood de le North doore deins meſme le eſgliſe, ou le tombe de S. Erkenwald, ou al huis de tiel chappell, ou a tiel pillier, deins meſme l'eſgliſe, que adonque bien liſt al auantact A. et a ſes heires d'entrer, &c. en tiel caſe il ne beſoigne de querer le feoffee en auter lieu, ne d'eſtre en auter lieu, forſque en le lieu compriſe en l'endenture, ne d'eſtre la pluis longe temps que le temps ſpecifie en meſme l'endenture, pur tender ou payer le money a le feoffee, &c.

hour of ſundrie of the ſame Feaſt, at the Rood loft of the Rood of the North doore within the ſame church, or at the tombe of Saint Erkenwald, or at the doore of ſuch a chappell, or at ſuch a pillar, within the ſame church, that then it ſhal be lawfull to the aforeſaid *A.* and his heires to enter, &c. in this caſe he needeth not to ſeek the feoffee in an other place, nor to bee in any other place, but in the place compriſed in the indenture, nor to bee there longer than the time ſpecified in the ſame indenture, to tender or pay the money to the feoffee, &c.

HERE is good counſell and advice given, to ſet downe in conveyances every thing in certaintie and particularitie, for certaintie is the mother of quietneſe and repoſe, and incertaintie the cauſe of variance and contentions; and for obtaining of the one, and avoyding of the other, the beſt meane is, in all aſſurances, to take counſell of learned and well-experienced men, and not to truſt onely without advice to a precedent. For as the rule is concerning the ſtate of a man's bodie, *Nullum medicamentum eſt idem omnibus*, ſo in the ſtate and aſſurance of a man's land, *Nullum exemplum eſt idem omnibus.*

"*Al tombe de Saint Erkenwald, &c.*" This *Erkenwald* was a younger ſonne of *Anna*, king of the *Eaſt Saxons*, and was firſt abbot of *Cherſey* in *Surrey* which he had founded, and after biſhop of *London*, a holy and devout man, and lieth buried in the ſouth iſle, above the quire in Saint *Paul's* church, where the tombe yet remaineth, that *Littleton* ſpeaketh of in this place: he flouriſhed about the yeare of our Lord 680.

The reſidue of this Section and the (*&c.*) are evident.

Sect. 343.

ITEM, en tiel caſe, lou le lieu † de payment eſt limitte, le feoffee n'eſt ‡ oblige de receiver le payment en nul auter lieu forſque en meſme le lieu iſſint limit. Mes uncore ſi il reſceivt le payment en auter lieu ceo eſt aſſets bone, et auxy fort pur le feoffor ſicome le receit uſt eſte en meſme le lieu iſſint limit, &c.

ALSO, in ſuch caſe, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the ſame place ſo limitted. But yet if he doe receive the payment in another place, this is good enough and as ſtrong for the feoffor as if the receipt had beene in the ſame place ſo limited, &c.

† *de payment*, not in L. and M. nor Roh.

‡ *pas* added in L. and M. and Roh.

HEREBY

(6 Rep. 46. b. 47 Plo. 69. b. 5 Rep. 117.)

HEREBY it appeareth that the place is but a circumſtance; and therefore if the obligee receiveth it at any other place, it is ſufficient, though he be not bound to receive it at any other place. And ſo it is if the money be to be paid on ſuch a feaſt, yet if the money be tendred and received at any time before the day, it is ſufficient (1). [212. b.]

Sect. 344.

*ITEM, en tiel caſe de feoffment en mortgage, ſi le feoffor payu al feoffee un chival, ou hanap d'argent, ou un annel d'or, ou auter tiel choſe en plein ſatisfaction del money, et l'auter ceo receivyt, ceo eſt aſſets bone, et auxy fort ſicome il uſt receive la ſumme del money, coment que le chival ou l'auter choſe ne fuit de vintiſme part del value de ſumme de le money, pur ceo que l'auter avoit ceo accept en pleine ſatisfaction.**

ALSO, in the caſe of feoffment in morgage, if the feoffor payeth to the feoffee a horſe, or a cup of ſilver, or a ring of gold, or any ſuch other thing in ful ſatisfaction of the money, and the other receiveth it, this is good enough, and as ſtrong as if hee had received the ſumme of money, though the horſe or the other thing were not of the twentieth part of the value of the ſum of money, becauſe that the other hath accepted it in ful ſatisfaction.

(Dyer 1.) 3 H. 7. 4. b. 9 H. 7. 16. 11 H. 7. 20, 21. 19 E. 4. 1. b. 47 E. 3. 24. 22 E. 4. 24. 37 H. 6. 26. Li. 9. fo. 78. Peytoe's caſe. (1 Roll. Rep. 296.) 12 H. 4. 23. * Peytoe's caſe ubi ſupra. (Ant. 207.)

HEREUPON are many diverſities worthy of obſervation.

Firſt, there is a diverſitie, when the condition is for payment of money; and when for the deliverie of a horſe, a robe, a ring, or the like: for where it is for payment of money, there if the feoffee or obligee accept an horſe, &c. in ſatisfaction, this is good: but if the condition were for the deliverie of a horſe, or robe, there, albeit the obligee or feoffee accept money or any other thing for the horſe, &c. it is no performance of the condition. The like law is, if the condition bee to acknowledge a recognizance of twentie pounds, &c. if the obligee or feoffee accept twenty pounds in ſatisfaction of the condition, it is not ſufficient in law, * but notwithſtanding ſuch acceptance, the condition is broken. And ſo it is of all other collaterall conditions, though the obligee or feoffee himſelfe accept it.

4 H. 7. 4. Dy. 35 H. 8. 56. 27 H. 8. 1. (Ant. 208. b.)

Secondly, in caſe when the condition is for payment of money, there is a diverſitie when the money is to be payd to the partie, and when to an eſtranger; for when it is to bee payd to an eſtranger, there if the ſtranger accept an horſe or any collaterall thing in ſatisfaction of the money, it is no performance of the condition, becauſe the condition in that caſe is ſtrictly to be performed. But if the condition be, that a ſtranger ſhal pay to the obligee or feoffee a ſum of money, there the obligee or feoffee may receive a horſe, &c. in ſatisfaction.

Lib. 5, fo. 117. Pinnel's caſe.

Thirdly, where the condition is for payment of twentie pounds, the obligor or feoffor cannot at the time appointed pay a leſſer ſumme in ſatisfaction of the whole, becauſe it is apparant that a leſſer

(1) [See Note 113.]

* &c. added in L. and M. and Roh.

leſſer ſumme of money cannot be a ſatisfaction of a greater. But if the obligee or feoffee doe at the day receive part, and thereof make an acquittance under his ſeale in full ſatisfaction of the whole, it is ſufficient, by reaſon the deed amounteth to an acquittance of the whole. If the obligor or leſſor pay a leſſer ſumme either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good ſatisfaction. 26 H. 6. tit. Barre 37. (Sid. 44. Poſt. 373. a. Mo. 47.)

Fourthly, not onely things in poſſeſſion may be given in ſatisfaction, (whereof *Littleton* putteth his caſe,) but alſo if the obligee or feoffee accept a ſtatute or a bond in ſatisfaction of the money, it is a good ſatisfaction. 30 E. 3. 23. (Hob. 68, 69.)

If the obligor or feoffor be bound by condition to pay an hundred markes at a certaine day, and at the day the parties doe account together, and for that the feoffee or obligee did owe twentie pound to the obligor or feoffor, that ſumme is allowed, and the reſidue of the hundred markes paid, this is a good ſatisfaction, and yet the twenty pound was a choſe in action, and no payment was made thereof, but by way of retainer or diſcharge (1). 11 R. 2. tit. Barre 3. 43. (1 Roll. Abr. 470. 604.) (Noy. 110. 5. Rep. 117.) 37 H. 6. 26. 46 E. 3. 33. 34 H. 6. 17. 12 H. 8. 1. b.

[213. a.]

"En pleine ſatisfaction." *Nota*, in ſatisfaction and in full ſatisfaction is all one.

Sect. 345.

*ITEM ſi home enfeoffa un auter * ſur condition, que il et ſes heires rendront a un eſtrange home & a ſes heires un annuel rent de 20 s. &c. et ſi il ou ſes heires failont de payment de ceo, que adonques bien lirroit al feoffor et a ſes heires de entrer, ceo eſt bon condition; et uncore en ceſt cas, coment que tiel annuall payment eſt appelle en l'endenture un annuall rent, ceo n'eſt pas properment rent. Car s'il ſerroit rent, il covient eſtre rent ſervice, ou rent charge, oú rent ſecke, et † il n'eſt aſcun de eux. Car ſi l'eſtrange fuit ſeiſie de ceo, et puis il fuit a luy denie, il n'avera unque aſſiſe de ceo, pur ceo que il n'eſt ‡ pas iſſuant ‖ hors d'aſcun tenements; et iſſint l'eſtrange n'ad aſcun remedie, ſi tiel annual rent ſoit aderere en ceſt cas, mes que le feoffor ou ſes heires poient entrer, &c. Et uncore ſi le feoffor ou ſes heires entront pur default de payment, adonque tiel rent eſt ale a touts jours. Et iſſint tiel rent § n'eſt forſque*

ALSO if a man infeoffe an other upon condition, that hee and his heires ſhall render to a ſtranger and to his heires a yearely rent of 20 ſhillings, &c. and if hee or his heires faile of payment thereof, that then it ſhall bee lawfull to the feoffor and his heires to enter, this is a good condition: and yet in this caſe, albeit ſuch annuall payment be called in the indenture a yearely rent, this is not properly a rent. For if it ſhould bee a rent, it muſt bee rent ſervice, rent charge, or a rent ſecke, and it is not any of theſe. For if the ſtranger were ſeiſed of this, and after it were denied him, hee ſhall never have an aſſiſe of this, becauſe that it is not iſſuing out of any tenements; and ſo the ſtranger hath not any remedy, if ſuch yearely rent be behind in this caſe, but that the feoffor or his heires may enter, &c. And yet if the feoffor or his heires enter for default of payment, then ſuch

(1) [See Note 114.]

* *en fee* added L. and M. and Roh.

† *que* added L. and M. and Roh.

‡ *pas* not in L. and M.

‖ *hors* not in L. and M.

§ *n' eſt—eſt*, L. and M. and Roh.

forſque un peine aſſeſſe a le tenant et ſes heires, que s'ils ne voilent payer ceo ſolonque la forme del indenture, ils perdront lour terre per l'entrie del feoffor ou ſes heires pur default de paiment. Et en ceſt cas il ſemble que le feoffee et ſes heires doyent querer le eſtranger et heires s'ils ſont deins Engleterre,† pur ceo que nul lieu eſt limit l'ou le payment ſerra fait, et pur ceo que tiel rent n'eſt pas iſſuant ‡ hors d'aſcun terre, &c.

ſuch rent is taken away for ever. And ſo ſuch a rent is but as a paine ſet upon the tenant and his heires, that if they will not pay this according to the forme of the indenture, they ſhall loſe their land by the entrie of the feoffor or his heires for default of payment. And in this caſe it ſeemeth that the feoffee and his heires ought to ſeeke the ſtranger and his heires if they bee within *England*, becauſe there is no place limited where the payment ſhall bee made, and for that ſuch rent is not iſſuing out of any land, &c.

(Dr. and Stud. cap. 20.)

"*RENDRONT a un eſtrange home un annuel rent, &c.*" This reſervation is meerely void [a] for the reaſons hereafter in this *ſection* alledged by *Littleton*, and alſo for that no eſtate moveth from the ſtranger, and that he is not partie to the deed.

[a] Lib. 6. fol. 70, 71. (Ple. 243. fera bon in caſe le Roy. Ant. 47. a. Cro. Car. 288. Ant. 143. b.)

And albeit it bee a voyde reſervation, and can be no rent, and the words of the condition be, that if the feoffee or his heires faile of payment of it, (that is of the annuall rent) that then, &c. yet it appeareth that the condition is good, and annuall rent ſhall bee taken for an annuall ſumme of money in groſſe, and not in the proper ſignification thereof, viz. to bee a rent iſſuing out of land, which is to bee obſerved, that words in a condition ſhall bee taken out of their proper ſenſe, *ut res magis valeat quàm pereat*, and ſo in like caſes it is holden [b] in our bookes.

[b] 6 E. 2. entr. cong. 55. recipere. 8 Aſſ. 34. revertere.

(1 Rep. 76. Godbolt 448.)

But if *A.* bee ſeiſed of certaine lands and *A.* and *B.* joyne in a feoffment in fee, reſerving a rent to them both and their heires, and the feoffee grant that it ſhall be lawfull for them and their heires to diſtreine for the rent, this is a good grant of a rent to them both, becauſe hee is partie to the deed, and the clauſe of diſtreſſe is a grant of the rent to *A.* and *B.* as it appeareth before in the chapter of rents. But if *B.* had beene a ſtranger to the deed, then B. had taken nothing. And upon this diverſitie are all the bookes [c], which *primâ facie* ſeeme to vary, reconciled.

(Ant. 148. a. Sect. 221.)

[213. b.]

[c] 18 E. 2. Aſſ. 381. 26 H. 8. 2. 13 E. 2. feoffments & faits 108. 31 Aſſ. pl. 31.

"*Car s'il ſerra rent, il covient eſtre rent ſervice, rent charge, ou rent ſecke, et il n'eſt nul de eux.*" This is a good *logicall* argument *à diviſione, & argumentum à diviſione eſt fortiſſimum in lege.* [d] *Littleton* uſeth this argument elſewhere, where ſee more of this matter.

[d] Vide Sect. 381.

"*Pur default de payment.*" Note here, ſeeing it is but a ſumme in groſſe, there need no demand of the rent; for *Littleton* here ſaith, that the feoffee ought to ſeeke the perſon of the ſtranger to pay him the ſumme of money, becauſe it is a ſumme in groſſe and not iſſuing out of the land.

† *pur ceo que nul lieu eſt limit l' ou le payment ſerra fait, et*, not in L. and M. nor Roh.

‡ *hors* not in L. and M. nor Roh.

Sect.

Sect. 346.

ET hic nota *deux choſes: un eſt, que nul rent (que properment eſt dit rent) poit eſtre reſerve ſur aſcun feoffment, done, ou leas, forſque tantſolement al feoffor, ou al donor, ou al leſſor, ou a lour heires, & en nul* ‖ *maner* § *il poit eſtre reſerve a aſcun eſtrange perſon. Mes ſi deux joyntenants font un leas per fait endent, reſervant a un de eux un certaine annuall rent, ceo eſt aſſets bon a luy a que le rent eſt reſerve, pur ceo que il eſt privy a le leaſe & nemy eſtrange a le leas, &c.*

AND here note two things: one is, that no rent (which is properly ſaid a rent) may be reſerved upon any feoffment, gift, or leaſe, but onely to the feoffor, or to the donor, or to the leſſor, or to their heires, and in no manner it may bee reſerved to any ſtrange perſon. But if two jointenants make a leaſe by deed indented, reſerving to one of them a certain yearely rent, this is good enough to him to whom the rent is reſerved, for that hee is privie to the leaſe, and not a ſtranger to the leaſe, &c.

"*A Le feoffor, donor, &c. ou a lour heires.*" Hereby it may ſeem that if a man make a feoffment, gift, or leaſe, that (omitting himſelfe) he may reſerve a rent to his heires (1). But *Littleton* is not ſo to be underſtood; his meaning is, that either the feoffor, &c. may reſerve the rent to himſelfe only, or to himſelfe and his heires. And yet it is holden [*e*] in our bookes, that a man may make a feoffment in fee reſerving a rent of forty ſhillings to the feoffor for tearme of his life, and after his deceaſe, a pound of comyne to his heires, that this is good.

[214. a.]

If a man make a feoffement in fee, reſerving a rent to him or his heirs, it is good [*f*] to him for tearme of his life, and void to his heire.

(Hob. 130. 2 Roll. Abr. 417. Poſt. 386. 8 Rep. 71. Ant. 39. b.)

[*e*] 5 E. 3. 27, 28. (Ant. 161. a.) (10 Rep. 106. Hob. 130.)

(Ant. 47. a.)

[*f*] Lib. 5. fol. 111. Mallorie's caſe.

"*Mes ſi 2 joyntenants font un leaſe per fait indent, &c.*" (1)

This caſe being by deed indented, is evident, and it hath been touched before; but if that two joyntenants without a deed indented make a leaſe for life, reſerving a rent to one of them, it ſhall enure to them both in reſpect of the joynt reverſion. And ſo it is of a ſurrender to one of them, it ſhall enure to them both.

5 E. 4. 4. a. 27 H. 8. 16. Vide Sect. 58. (Poſt. 318. a. Ant. 47. a.)

If two joyntenants, the one for life, and the other in fee, joyne in a leaſe for life, or a gift in tayle, reſerving a rent, the rent ſhal enure to them both; for if the particular eſtate determine, they ſhall be joyntenants againe in poſſeſſion. But if tenant for life, and he in the reverſion joyn in a leaſe for life, or a gift in taile by deed, reſerving a rent, this ſhall enure to the tenant for life onely, during his life, and after to him in the reverſion, for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the feoffee ſhould have

(Ant. 192. a. 6 Rep. 15. Ant. 42. a. 45. a. 53. b. 198. a.)

Vide Sect. 58.

‖ *anter* added in L. and M. and Roh.
§ *il* not in L. and M. nor Roh.
(1) [See Note 115.]

[214. a.]
(1) [See Note 116.]

have holden of the tenant for life during his life, and after of him in reverſion, and ſo it was holden [g] in the King's Bench.

[g] Mich. 36 & 37 Eliz.

Sect. 347.

*LE ſecond choſe * eſt, que nul entrie ou reentrie (que eſt tout un) † poit etre reſerve ne done a aſcun perſon, forſque tantſolement al feoffor, ou al donor, ou al leſſor, ou a lour heires: & tiel ‡ reenter ne poyt eſtre grant a un auter perſon. Car ſi home leſſa ‖ terre a un auter pur terme de vie per indenture, rendant al leſſor et a ſes heires certaine rent, & pur default de payment un reentry, &c. ſi apres le leſſor per un fait granta le reverſion de la terre a un auter en fee, et le tenant a terme de vie atturna, &c. ſi le rent apres ſoit aderere, le grantee de le reverſion poit diſtreiner pur le rent, pur ceo que le rent eſt incident a le reverſion; mes il ne poit entrer en la terre, & ouſte le tenant, ſicome le leſſor puiſſoit ou ſes heires, ſi le reverſion uſt eſte continue en eux, &c. Et en ceſt caſe l'entrie eſt tolle a touts temps; car le grantee de le reverſion ne poit entrer,* cauſâ quâ ſuprà. *Et le leſſor ne ſes heires ne poyent enter; car ſi le leſſor puiſſoit entrer, donques il covient que il ſerroit § en ſon primer eſtate, &c. et ceo ne poit eſtre, pur ceo que il ad alien de luy le reverſion.*

THE ſecond thing is, that no entry nor reentry (which is all one) may be reſerved or given to any perſon, but only to the feoffor, or to the donor, or to the leſſor, or to their heires: and ſuch reentrie cannot be given to any other perſon. For if a man letteth land to another for tearme of life by indenture, rendring to the leſſor and to his heires a certaine rent, and for default of payment a reentry, &c. if afterward the leſſor by a deed granteth the reverſion of the land to another in fee, and the tenant for terme of life attorne, &c. if the rent be after behind, the grantee of a reverſion may diſtreine for the rent, becauſe that the rent is incident to the reverſion; but he may not enter into the land, and ouſte the tenant, as the leſſor might have done, or his heires, if the reverſion had beene continued in them, &c. And in this caſe the entrie is taken away for ever; for the grantee of the reverſion cannot enter, *cauſâ quâ ſuprà.* And the leſſor nor his heires cannot enter; for if the leſſor might enter, then he ought to be in his former ſtate, &c. and this may not bee, becauſe hee hath aliened from him the reverſion.

(1 Roll. Abr. 873.) "*QUE nul entric, &c.*" Here *Littleton* reciteth one of the maximes of the common law; and the reaſon hereof is, for avoyding of maintenance, ſuppreſſion of right, and ſtirring up of ſuites: and therefore nothing in action, entrie, or re-entrie, can bee granted over; for ſo under colour thereof pretended titles might bee granted to great men, wherby right might bee trodden downe, and the weake oppreſſed, which the common law forbiddeth, as men to grant before they be in poſſeſſion.

"*Pur*

* *eſt* not in Roh. but in L. and M.
† *ne* added in L. and M. and Roh.
‡ *reenter—rent* in L. and M. and Roh.
‖ *certeine* added in L. and M. and Roh.
§ *en—a* in L. and M. and Roh.

214. b.] "*Pur default de payment un recntrie, &c.*" Hereupon is to bee collected divers diverſities. Firſt, betweene a condition that requireth a re-entrie, and a limitation that *ipſo facto* determineth the eſtate without any entry. Of this firſt ſort no ſtranger, as *Littleton* ſaith, ſhall take any advantage, as hath beene ſaid. But of limitations it is otherwiſe. As if a man make a leaſe *quouſque*, that is, untill *I. S.* come from *Rome*, the leſſor grant the reverſion over to a ſtranger, *I. S.* comes from *Rome*, the grantee ſhal take advantage of it and enter, becauſe the eſtate by the expreſſe limitation was determined. (10 Rep. 42.) (Plo. 242. a. 1 Roll. Abr. 411. Poſt. 379. a.)

So it is if a man make a leaſe to a woman *quamdiu caſta vixerit*, or if a man make a leaſe for life to a widow, *ſi tamdiu in purâ viduitate viveret*. So it is if a man make a leaſe for a 100 yeares if the leſſee live ſo long, the leſſor grants over the reverſion, the leſſee dies, the grantee may enter, *cauſâ quâ ſuprà*. Regiſter 246. Pl. Com. 27. 34 E. 3. Formedon 68. F. N. B. 201. Lib. 10. fo. 36. Mary Portington's caſe.

2. Another diverſitie is betweene a condition annexed to a freehold, and a condition annexed to a leaſe for years.

For if a man make a gift in taile for a leaſe for life upon condition, that if the donee or leſſee goeth not to *Rome* before ſuch a day the gift or leaſe ſhall ceaſe or be void, the grantee of the reverſion ſhall never take advantage of this condition, becauſe the eſtate cannot ceaſe before an entrie; but if the leaſe had beene but for yeares, there the grantee ſhould have taken advantage of the like condition, becauſe the leaſe for yeares *ipſo facto* by the breach of the condition without any entry was void; for a leaſe for yeares may begin without ceremony, and ſo may end without ceremony; but an eſtate of freehold cannot begin nor end without ceremony. And of a voide thing an eſtranger may take benefit, but not of a voidable eſtate by entry. (Plo. 242. a.) Brooke tit. Condition in Abr. 11 H. 7. Lopinion de Bromley. 10 E. 52. 10. Aſſ. Pl. 24. Pl. Com. 36. 11 H. 7. 17. 19 R. 2. Done 10. (1 Roll. Abr. 475. Noy 7. 3 Rep. 64. b. 65. 8 Rep. 95.)

"*Al ſcoffor, ou al donor, &c. ou a lour heires, &c.*" Here is to be obſerved a diverſitie betweene a reſervation of a rent and a re-entry; for (as it hath beene ſaid) a rent cannot be reſerved to the heire of the feoffor, but the heire may take advantage of a condition, which the feoffor could never doe. As if I infeoffe another of an acre of ground upon condition that if mine heire pay to the feoffee, &c. 20 ſhillings, that he and his heire ſhall re-enter, this condition is good; and if after my deceaſe my heire pay the 20 ſhillings, hee ſhall re-enter, for he is privy in blood, and enjoy the land as heire to me. (Poſt 215. b.) Pl. Com. 313, 314. in Scolaſticae's caſ. (Hob. 130.) 15 E. 4. 14. a.

"*Forſque tantſolement al feoffor, &c. ou a lour heires.*" Our author ſpeaketh here of naturall perſons for an example, for if a biſhop, archdeacon, parſon, prebend, or any other body politique or corporate, eccleſiaſtical or temporal, make a leaſe, &c. upon condition, his ſucceſſor may enter for the condition broken, for they are privy in right. 21 H. 7. 18. a. (Ant. 46. b.)

And ſo if a man have a leaſe for yeares and demiſe or grant the ſame upon condition, &c. and die, his executors or adminiſtrators ſhall enter for the condition broken, for they are privie in right, and repreſent the perſon of the dead.

215. a.] [*y*] If *ceſtuy que uſe* had made a leaſe for yeares, &c. upon condition, the feoffees ſhould not enter for the condition broken, for they are privie in eſtate, but not privie in blood. [*y*] 27 H. 8. 1.

Another diverſitie is in caſe of a leaſe for yeares, where the condition is that the leaſe ſhall ceaſe, or be void, as is aforeſaid, and where the condition is, that the leſſor ſhall re-enter, for there (4 Rep. 52. Ant. 211. b. 1 Roll. Abr. 475. 8 Rep. 64.)

the grantee, as *Littleton* ſaith, ſhall never take benefit of the condition.

Pl. Com. Browning's caſe, 136.

And it is to be obſerved, that where the eſtate or leaſe is *ipſo facto* voide by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwiſe it is of an eſtate or leaſe voydable by entrie. (1)

Another diverſitie is betweene conditions in deed, whereof ſufficient hath beene ſaid before, and conditions in law. As if a man make a leaſe for life, there is a condition in law annexed unto it, that if the leſſee doth make a greater eſtate, &c. that then the leſſor may enter. Of this and the like conditions in law, which doe give an entrie to the leſſor, the leſſor himſelfe and his heires ſhall not onely take benefit of it, but alſo his aſſignee and the lord by eſcheat, every one for the condition in law broken in their owne time. Another diverſity there is betweene the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the ſtatute [*] of 32 *H.* 8. cap. 34. [*a*] For by the common law no grantee or aſſignee of the reverſion could (as hath been ſaid) take advantage of a re-entrie by force of any condition. For at the common law, if a man had made a leaſe for life reſerving a rent, &c. and if the rent be behind a re-entrie, and the leſſor grant the reverſion over, the grantee ſhould take no benefit of the condition, for the cauſe before rehearſed. But now by the ſaid ſtatute of 32 *H.* 8. the grantee may take advantage therof, and upon demand of the rent, and non-payment, he may re-enter. By which act it is provided, that as well every perſon which ſhall have any grant of the king of any reverſion, &c. of any lands, &c. which pertained to monaſteries, &c. as alſo all other perſons being grantees or aſſignees, &c. to or by any other perſon or perſons, and their heires, executors, ſucceſſors, and aſſignees ſhal have like advantage againſt the leſſees, &c. by entry for non-payment of the rent, or for doing of waſte or other forfeiture, &c. as the ſaid leſſors or grantors themſelves ought or might have had. Upon this act divers reſolutions and judgements have beene given, which are neceſſary to be know'ne.

(1 Saun. 237, 238, 239, 240, 241.)

[*] 32 H. 8. cap. 34. in le preamble.

[*a*] 26 H. 6. tit. ent. cog. 49.

(Plo. 175. b.)

[*b*] Pl. Com. Hill. and Grange's caſe. 175, 176. M. 10 & 11 Eliz. 180. Dier. ibid. 14 Eliz. Dyer 309. Wynter's caſe.

1. That the ſaid ſtatute is generall, *viz.* [*b*] that the grantee of the reverſion of every common perſon, as well as of the king, ſhall take advantage of conditions.

2. That the ſtatute doth extend to grants made by the ſucceſſors of the king, albeit the king be only named in the act.

3. That where the ſtatute ſpeaketh of leſſees, that the ſame doth not extend to gifts in taile.

[*d*] Pl. Com. Kidwellye's caſe 69. Vid. Dyer Mich. 14 & 15 Eliz. 309. (1 Roll. Abr. 472. Poſt. 385. a.

4. That where the ſtatute ſpeakes of grantees and aſſignees of the reverſion, [*d*] that an aſſignee of part of the ſtate of the reverſion may take advantage of the condition. As if leſſee for life &c. and the reverſion is granted for life, &c. So if leſſee for yeares, &c. bee, and the reverſion is granted for yeares, the grantee for yeares ſhall take benefit of the condition in reſpect of the word (*executors*) in the act.

Ante 148. a. 1 Roll. Abr. 471. Mo. 93.) Vide 7 E. 3. 54. Simile adjudged in Comm Banco in the Lord Dyer's time. P. 17 Eliz. Mich. 14 & 15 Eliz. Dyer 309. adjudged Winter's ca

[*e*] Lib. 5. fo. 54. Knight's caſe. Winter's caſe ubi ſupra. Knight's caſe ubi ſupra.

5. That a grantee of part of the reverſion ſhall not [*e*] take advantage of the condition; as if the leaſe be of three acres reſerv

(1) [See Note 117.]

reſerving a rent upon condition, and the reverſion is granted of two acres, the rent ſhall be apportioned by the act of the parties, but the condition is deſtroyed, for that it is entire and againſt common right.

6. That in the king's caſe, the condition in that caſe is not deſtroyed, but remaines ſtill in the king.

7. By act in law a condition may bee apportioned in the caſe of a common perſon; as if a leaſe for yeares be made of two acres, one of the nature of Burrough Engliſh, the other at the common law, and the leſſor having iſſue two ſonnes, dieth, each of them ſhall enter for the condition broken, and likewiſe a condition ſhall be apportioned by the act and wrong of the leſſee, as hath been ſaid in the chapter of Rents. Lib. 4. fo. 120. Dumper's caſe. (4 Leo. 27, 28, 29, 30. Mo. 202, 203.)

8. If a leaſe for life be made, reſerving a rent upon condition, &c. the leſſor levies a fine of the reverſion, he is grantee or aſſignee of the reverſion; but without atturnment hee ſhall not take advantage of the condition, for the makers of the ſtatute intended to have all neceſſary incidents obſerved, otherwiſe it might be miſchievous to the leſſee. (2) Reſolved in Duke's caſe. Paſch. 20 Eliz. in Communi Banco. Mallorie's caſe lib. 5. 112. b.

9. There is a diverſity betweene a condition that is compulſory, and a power of revocation that is voluntary: for a man that hath a power of revocation may by his owne act extinguiſh his power of revocation in part, as by levying of a fine of part; and yet the power ſhall remaine for the reſidue, becauſe it is in nature of a limitation, and not of a condition; and ſo it was reſolved [*b*] in the earle of Shrewſburie's caſe in the court of wards, *Paſch.* 39 *Eliz.* *and Mich.* 40 & 41 *Eliz.* (1 Roll. 472. Hob. 313. Poſt. 237. 265. b. 1 Rep. 112, 113.) [*b*] 14 Eliz. Dyer 39.

10. If the leſſor bargaine and ſell the reverſion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet hee is an aſſignee within the ſtatute. So if the leſſor grant the reverſion in fee to the uſe of *A.* and his heires, *A.* is a ſufficient aſſignee within the ſtatute, becauſe he comes in by the act and limitation of the partie, albeit he is in the *poſt*, and the words of the ſtatute be, *to or by*, and they be aſſignees to him, although they be not by him: but ſuch as come in meerly by act in law, as the lord of the villeine, the lord by eſcheat, the lord that entreth or claimeth for mortmaine, or the like, ſhall not take benefit of this ſtatute. (1 Rep. 173. b. 4 Rep. 119. b.) (1 Roll. Abr. 422.) (3 Rep. 62. b.)

[215. b.]

11. If the leſſor in the caſe before bargaine and ſell the reverſion by deed indented and inrolled, or if the leſſor make a feoffment in fee, and the leſſee re-enter, the grantee or feoffee ſhall not take any advantage of any condition, without making notice to the leſſee. Lib. 5. fo. 113. Mallorie's caſe. Lib. 8. fol. 92. France's caſe. (Cro. Jac. 9. 1 Roll. 46.)

12. Albeit the whole words of the ſtatute be, for non-payment of the rent, or for doing of waſt or other forfeiture, yet the grantees or aſſignees ſhall not take benefit of every forfeiture, by force of a condition, but only of ſuch conditions as either are incident to the reverſion, as rent, or for the benefit of the ſtate, as for not doing of waſt, for keeping the houſes in reparations, for making of fences, ſcouring of ditches, for preſerving of woods, or ſuch like, and not for the payment of any ſumme in groſſe, delivery of corne, wood, or the like, ſo as other forfeiture ſhall be taken for other forfeitures like to thoſe examples which were there put, And ſo was it reſolved in Wynter's caſe, Mich. 14 and 15 Eliz. in Communi Banco, and oftentimes ſince. Vide Dyer 309. (Plo. 242. 1 Saun. 240. 1 Leo. 62.)

(2) [See Note 118.]

put, (*videlicet*) of payment of rent, and not doing of waſt, which are for the benefit of the reverſion. (1)

Sect. 348.

ITEM ſi ſoyt ſeignior et tenant, et le tenant fait un tiel leaſe pur terme de vie, rendant a leſſor et a ſes heires tiel annual rent, et pur default de payment un re-entrie, &c. ſi apres le leſſor moruſt ſans heire durant la vie le tenaunt a terme de vie, per que le reverſion devient al ſeignior per voy d'eſcheat, et puis le rent de le tenaunt a terme de vie ſoit ariere, le ſeignior poet deſtreiner le tenant pur le rent arere; mes il ne poet entrer en la terre per force del condition, &c. pur ceo que il n'eſt pas heire al leſſor, &c.*

ALSO if lord and tenant bee, and the tenant make a leaſe for terme of life, rendering to the leſſor and his heyres ſuch an annuall rent, and for default of payment a re-entrie, &c. if after the leſſor dyeth without heire during the life of the tenant for life, whereby the reverſion commeth to the lord by way of eſcheat, and after the rent of the tenant for life is behind, the lord may diſtrein the tenant for the rent behind; but he may not enter into the land by force of the condition, &c. becauſe that hee is not heire to the leſſor, &c.

(F.N.B. 144. b.) "*AL ſeignior per voy de eſcheat, &c.*"

19 E. 3. Reſceit 14.

Note, here it appeareth, that the lord by eſcheat ſhall diſtreine for the rent, and yet the rent was reſerved to the leſſor and his heires; but both aſſignees in deed and aſſignees in law ſhal have the rent, becauſe the rent being reſerved of inheritance to him and his heirs, is incident to the reverſion, and goeth with the ſame. But if the rent were reſerved to him and his aſſignes, and the leſſor aſſigned over the reverſion, and dyeth, the aſſignee ſhall not have the rent after his deceaſe, becauſe the rent determined by his death, for that it was not reſerved to him, his heirs, and aſſignes.

(Ant. 1. b. 47. a.)

"*Mes il ne poet entrer en la terre pur force del condition, &c.*"

Hereby it appeareth, that at the common law neither aſſignes in deed nor aſſignes in law could have taken the benefit of either entrie or re entrie, by force of a condition.

"*Pur ceo que il n'eſt pas heire al leſſor, &c.*"

[*f*] 21 H. 7. 18. 17 Aſſ. 20. 19 E. 3. Gard. 113, 114.

The gardian in chivalrie [*f*] or in focage ſhall in the right of the heire take benefit of a condition by entrie or re-entrie, by the common law, and ſo it is here implyed.

18 Aſſ. pl. 18. lib. 7. fol. 7. The earl of Bedford's caſe.

(1) [See Note 118.]

* *leſſer—feoffor*, L. and M. and Roh.

Sect.

[216. a.] Sect 349. (8 Rep. 73. Plow. 481.) (Ant. 26.)

*ITEM ſi terre ſoit graunt a un *home pur terme de deux ans ſur tiel condition, que s'il payeroit al grantor deins les dits deux ans* 40 *marks,† adonques il averoit la terre a luy et a ſes heires, &c. en ceſt caſe ſi le grantee enter per force de le grant, ſans aſcun liverie de ſeiſin fait a luy per le grantor, et puis il paya al grantor les* 40 *markes deins les deux ans, uncore il n'ad riens en la terre forſque pur terme de deux ans, pur ceo que nul liverie de ſeiſin a luy fuit fait al commencement. Car s'il averoit franktenement et fee en ceſt caſe, pur ceo que il ad performe le condition, donque il averoit franktenement per force del prime graunt, l'ou nul liverie de ſeiſin de ceo fuit fait, que ſerroit ‡inconvenient, &c. Mes ſi le grantor uſt fait liverie de ſeiſin al grantee per force de la grant, donque averoit le grantee le franktenement et le fee ſur meſme le condition.*

ALSO if land be granted to a man for terme of two yeares upon ſuch condition, that if hee ſhall pay to the grantor within the ſaid two yeares fortie marks, then he ſhal have the land to him and to his heyres, &c. in this caſe if the grantee enter by force of the grant, without any liverie of ſeiſin made unto him by the grantor, and after he payeth the grantor the forty markes within the two yeares, yet he hath nothing in the land but for terme of two yeares, becauſe no liverie of ſeiſin was made unto him at the beginning. For if he ſhould have a freehold and fee in this caſe, becauſe he hath performed the condition, then he ſhould have a freehold by force of the firſt grant, where no liverie of ſeiſin was made of this, which would be inconvenient, &c. But if the grantor had made liverie of ſeiſin to the grantee by force of the grant, then ſhould the grantee have the freehold and the fee upon the ſame condition.

HERE fixe things are to be obſerved. Firſt, *Littleton* here putteth an example of a condition precedent (1). Secondly, that ſuch a condition which createth an eſtate may be made by paroll without deed. Thirdly, that liverie of ſeiſin in this caſe muſt bee made before the leſſee enter, (as *Littleton* here ſaith at the beginning) for after his entrie liverie made to him that is in poſſeſſion is void, as hath been ſaid. Fourthly, that if no liverie of ſeiſin be made, that no fee ſimple doth paſſe, although the money be paid. Fifthly, that it is inconvenient that the fee ſimple ſhould paſſe in this caſe without livery of ſeiſin. Sixtly, that *argumentum ab inconvenienti*, is forcible in law, as often hath beene and ſhall be obſerved. See more of this kind of condition in the Section next following (2). Vide. Sect. 60. (Ant. 48. a.)

"*Et a ſes heires, &c.*" Here (*&c.*) impleyeth an eſtate in taile, or a leaſe for life.

* *home* not in L. and M. nor Roh.
† *que* added in L. and M. and Roh.
‡ *inconvenient, &c.—encontre reaſon* in L. and M. and Roh.

(1) See ſome obſervations on conditions precedent, and conditions ſubſequent, in the laſt note upon this chapter.
(2) [See Note 119.]

Sect. 350. [216. b.]

ITEM ſi terre ſoyt graunt a un home pur terme de 5 ans, ſur condition, que s'il pay al grantor deins les deux primer ans 40 markes, que adonque il averoit fee, ou autrement forſque pur terme de les 5 ans, et liverie de ſeiſin eſt fait a luy pur force de le graunt, ore il ad fee ſimple conditionell, &c. Et ſi en ceo caſe le grauntee ne paia my al grantor les 40 markes deins les primers deux ans, donques immediate apres meſmes les deux ans paſſes, le fee et le franktenement eſt et ſerra adjudge en le grantor, pur ceo que le grantor ne poet apres les dits deux ans maintenant enter ſur le grauntee, pur ceo que le grantee ad uncore title per trois ans d'aver et occupier la terre per force de meſme le grant. Et iſſint pur ceo que le condition del part le grantee eſt enfreint, et le grauntor ne poet entrer, la ley mittera le fee et le franktenement en le grantor. Cur ſi le grantee en ceſt caſe fait waſt, donques apres le enfreinder de le condition, &c. apres les deux ans, le grantor avera ſon briefe de waſt. Et ceo eſt bone proofe adonque, que le reverſion eſt en luy, &c.

ALSO if land be granted to a man for term of five yeares, upon condition, that if he pay to the grantor within the two firſt yeares forty markes, that then he ſhal have fee, or otherwiſe but for terme of the five yeares, and livery of ſeiſin is made to him by force of the grant, now he hath a fee ſimple conditionall, &c: And if in this caſe the grantee doe not pay to the grantor the fortie markes within the firſt two yeares, then immediately after the ſaid two yeares paſt, the fee and the freehold is and ſhall be adjudged in the grantor, becauſe that the grantor cannot after the ſaid two yeares preſently enter upon the grauntee, for that the grauntee hath yet title by three yeares to have and occupie the land by force of the ſame grant. And ſo becauſe that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grauntee in this caſe makes waſt, then after the breach of the condition, &c. and after the two yeares, the grantor ſhall have his writ of waſte. And this is a good proofe then, that the reverſion is in him, &c.

(5 Rep. 98.)

"*ORE il ad fee ſimple conditionall, &c.*" The like is of an eſtate in taile, or for life. Many are of opinion againſt *Littleton* in this caſe, and their reaſon is, becauſe the fee ſimple is to commence upon a condition precedent, and therefore cannot paſſe until the condition bee performed; and that here *Littleton* of a condition precedent doth (before the performance thereof) make it ſubſequent: and for proofe of their opinion they avouch many ſucceſſions of authorities that no fee ſimple ſhould paſſe before the condition performed. 31 *E.* 1, *tit. feoffments & faits* 119. *A.* letteth a mannor to *B.* for term of twenty years, and the deed would, that after the terme of twenty yeares that *B.* and his heirs ſhould hold the ſaid mannor for ever by twelve pounds rent, *A.* taketh a wife, and dyeth before the term be paſt, the wife of *A.* demands dower. And there *Wayland* chiefe juſtice ſaith, that the fee and the frank-tenement doth repoſe in the perſon of the leſſor untill the terme be paſt, for before that the condition is not performed; for if the leſſor had aliened the land before the end of the terme, *B.* ſhould not recover by a writ of aſſiſe, and by the death of the leſſor the chiefe lord ſhould

31 E. 1. tit. feoffments & faits 119.

[217. a.] ſhould have had the wardſhip of the heire of the leſſor, and by judgement the wife recovered dower, for the termor could not have lee, all which be the words of that booke.

12 E. 2. *tit voucher* 265. *I* letteth lands to *B.* for eight yeares, and if the leſſor pay not a hundred markes to the leſſee at the end of the tearme, that then he ſhall have fee: by the non-payment of the mony, the lee and franktenement accrueth to him, and before, the leſſee cannot be impleaded in a *præcipe*, neither ſhall he vouch. 12 E. 2. tit. Voucher 265. (8 Rep. 73. Plow. 481.)

[x] 7 E. 3. 10. *I.* letteth certaine lands to *N.* for the terme of ten yeares, rendring a hundred ſhillings by the yeare to him and his heires, and granted by deed, that if he held the lands over to him and his heires, that he ſhould render by the yeare twenty pounds: the leſſor during the tearme brought an action of debt for the rent. And there *Herle* chiefe juſtice of the common pleas giveth the rule, that during the tearme the leſſee had but for yeares, and therefore the action of debt maintenable. [x] 7 E. 3. 10. Pl. Com. Say's caſe 272.

[y] 44 E. 3. *tit. attaint.* 22 and 43 *Aſſ. p.* 41. *D.* and *A.* infeoffe the two plaintifes in the aſſiſe, they let thoſe lands to *S.* for tearme of nine yeares, upon condition, that if the plaintife in the aſſiſe pay a hundred ſhillings to *S.* during the tearme, that *S.* ſhall have it but for nine yeares, and if they pay it not, that *S.* ſhall have fee. *S.* continueth his eſtate by one yeare, and after granteth his eſtate to one *H.* which *H.* continueth his eſtate by two yeares, and granteth the reſidue of the tearme to *R.* and within the tearme of nine yeares the plaintifes in the aſſiſe pay the hundred ſhillings to *S.* *R.* continueth his poſſeſſion after the tearme, and infeoffeth *D.* which infeoffeth the lord *Furnivall*, againſt whom and others, without any claim or entry made by the plaintifes, after the nine yeares ended, he brought his aſſiſe, and after adjournment recovered. [y] 44 E. 3. tit. attaint. 22. 43 Aſſ. p. 41.

[z] 10 E. 3. 39 and 40. *R.* doth let certaine lands to *I.* for tearme of twelve yeares, and in ſuretie of his tearme he maketh a charter of the fee upon condition, that if he be diſturbed within the tearme, that he cannot hold the lands untill the end of the tearme, that then he ſhall hold the lands to him and his heires for ever, and leiſin was delivered upon the one charter and the other. *R.* within the tearme plowed and ſowed the land, and tooke the profits againſt the will of *I.* and *I.* upon this diſturbance had fee and recovered in aſſiſe. [z] 10 E. 3. 39, 40. 10 Aſſ. 15. tit. Aſſ. 161. Pl. Com. Browning's caſe 155.

6 *R.* 2. *tit. Quid juris clamat.* 20. If a leaſe be made for a tearme upon condition, if the leſſee pay a certain ſumme within the tearme, that then he ſhall have fee, if he pay the money he ſhall have the fee, but if before the day of payment the leſſor levieth a fine to another, the leſſee ought to attorn by proteſtation, and if he pay the money, the conuſee ſhal have it, and the conuſee ſhall have the rent reſerved untill the day of payment; and if land be letten for tearme of yeares upon condition, that if the leſſee be ouſted within the tearme by the leſſor, that he ſhall have fee, if he be ouſted, he ſhall have fee by the condition, and notwithſtanding he ſhall not have any aſſiſe, but he muſt have poſſeſſion after the ouſter, and of this he ſhall have an aſſiſe. 6 R. 2. tit. quid juris clamat. 20.

And generally the bookes (*) are cited that make a diverſitie between a condition precedent and a condition ſubſequent. (*) 15 H. 7. 1. a. 14 H. 8. 18. 20. 3 H. 6. 6. b.

And laſtly, they cite *Dier*, [a] 10. *Eliz.* 281, and in *Say* and *Fuller's* caſe, *Pl. Com.* 272, the opinions of *Dyer* and *Browne*. [a] Dyer 10 Eliz. 281. Pl. Com. 272.

Notwithſtanding al this there are thoſe that defend the opinion of *Littleton*, both by reaſon and authority. By reaſon, for that by the

the rule of law a liverie of ſeiſin muſt paſſe a preſent freehold to ſome perſon, and cannot give a freehold *in futuro*, as it muſt doe in this caſe, if after liverie of ſeiſin made the freehold and inheritance ſhould not paſſe preſently, but expect untill the condition be performed; and therefore if a leaſe for yeares be made to begin at *Michaelmas*, the remainder over to another in fee, if the leſſor make liverie of ſeiſin before *Michaelmas*, the liverie is voide, becauſe if it ſhould worke at all it muſt take effect preſently, and cannot expect.

Vide Litt. in the chapter of tenants for yeares.

Secondly, they ſay that when the leſſor makes liverie to the leſſee, it cannot ſtand with any reaſon that againſt his owne liverie of ſeiſin a freehold ſhould remaine in the leſſor, ſeeing there is a perſon able to take it. But if a man by deed make a leaſe for yeares, the remainder to the right heires of *I. S.* and the leſſor make liverie to the leſſee *ſecundum formam chartæ*, this liverie is voyd, becauſe during the life of *I. S.* his right heire cannot take (for *nemo eſt hæres viventis*), and in that caſe the freehold ſhall not remaine in the leſſor, and expect the death of *I. S.* during the tearme; for albeit *I. S.* die during the tearme, yet the remainder is void, becauſe a liverie of ſeiſin cannot expect.

(1 Rep. 130. 2 Rep. 67. a. Poſt. 378. a.)

And they ſay further, that ſeeing all the bookes aforeſaid prove that ſuch a condition is good, and that the livery made to the leſſee is effectuall, by conſequence the freehold and inheritance muſt paſſe preſently or not at all. [217. b.]

(2 Rep. 55.)

And it is is not rare, ſay they, in our bookes that words ſhall be tranſpoſed and marſhalled ſo as the feoffment or grant may take effect. [*b*] As if a man in the moneth of *February* make a leaſe for yeares reſerving a yearely rent payable at the feaſts of Saint *Michael* the Archangell, and the Annuntiation of our Lady, during the tearme, the law (in this caſe of reſervation) ſhall make tranſpoſition of the feaſts, *viz.* at the feaſts of the Annunciation, and of Saint *Michael* the Archangel, that the rent may be paid yearely during the tearme. And ſo it is [*c*] in caſe of a grant of an annuitie. And further they take a diverſitie in this caſe betweene a leaſe for life and a leaſe for yeares. For in caſe of a leaſe for life with ſuch a condition to have fee, they agree that the fee ſimple paſſeth not before the performance of the condition, for that the livery may preſently worke upon the freehold; but otherwiſe it is in the caſe of a leaſe for years. Alſo they take a diverſitie between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowſon for yeares upon condition, that if the grantee pay twenty ſhillings, &c. within the tearme, that then he ſhall have fee, the grantee ſhall not have fee untill the condition be performed. *Et ſic de ſimilibus.* But otherwiſe it is where liverie of ſeiſin is requiſite, and therefore if the king make ſuch a leaſe for yeares upon ſuch a condition, the fee ſimple ſhall not paſſe preſently, becauſe in that caſe no livery is made.

[*b*] Hill & Grange, Pl. Com. 171.

[*c*] 10 E. 3. Seignior Staffords caſe, lib. 8. fol. 74. Pl. Com. Nichol's caſe 487.

They alſo make ſeverall anſwers to the authorities before cited. For as to the caſe in 31 *E.* 1. they ſay that either the caſe is miſreported, or elſe the law is againſt the judgement. For the caſe is but this, that a man make a leaſe of a mannor to *B.* for twenty yeares, and that after the twentie yeares *B.* ſhall hold the mannor to him and his heires by 12 pound rent, and (as it muſt be intended) maketh livery of ſeiſin, in this caſe it is cleere (ſay they) that *B.* hath a fee ſimple *maintenant*, for there is no condition precedent in the caſe.

As for the caſe in 12 *E.* 2. the caſe (as it is put in the booke) is, that *John de Marre* made a charter to *John de Burford* of fee ſimple,

Seignior Staffords caſe ubi ſupra.

and

and the ſame day it was covenanted betweene them that *John de Burford* ſhould hold the ſame tenements for eight years, and if he did not pay a hundred markes at the end of the tearme that the land ſhall remaine to *John de Burford* and his heires. In which caſe, ſay they, there is direct repugnancy; for, firſt, the charter of the fee ſimple was abſolute, and after the ſame day it was covenanted between them, &c. this covenant being made after the charter, could neither alter the abſolute charter, nor upon a condition precedent give him a fee ſimple that had a fee ſimple before.

To all the other bookes, *viz.* 7 *E.* 3. 10 *E.* 3. 10 *Aſſ.* 44 *E.* 3. 43 *Aſſ.* and 6 *R.* 2. they ſay, that being rightly underſtood they are good law; for in ſome of theſe bookes, as namely in 10 *E.* 3. 10 *Aſſ.* &c. it appeareth that there was a charter made in ſurety of the tearm, which, ſay they, muſt be intended thus, *viz.* a man maketh a leaſe for yeares, the leſſee enters, and the leſſor makes a charter to the leſſee, and thereby doth grant unto him, that if he pay unto the leſſor a hundred markes during the tearme, that then he ſhall have and hold the lands to him and to his heires.

In this caſe, ſay they, there need no livery of ſeiſin, but doth enure as an executory grant by increaſing of the ſtate, and in that caſe, without queſtion, the fee ſimple paſſeth not before the condition performed. Pl. Com. in Nichol's caſe 487.

And therefore *Littleton* warily putteth his caſe of an eſtate made all at one time by one conveyance, and a livery made thereupon.

For *Littleton* himſelfe in the *Section* before ſaith, that in that caſe without a livery nothing paſſeth of the freehold and inheritance.

And this diverſity (ſay they) is proved by books; and thereupon they cite [*d*] 10 *E.* 3. 54. In a writ of dower the tenant vouched to warranty; the vouchee as to part pleaded that the huſband was never ſeiſed of any eſtate whereof ſhe might be endowed; as to the reſidue the tenant pleaded that he leaſed to the huſband in gage upon condition that if the leſſor paid ten markes at a certaine day, that he ſhould re-enter, and if he failed of payment, that the land ſhould remaine to the huſband and his heires, which muſt be intended to be done by one entire act, and pleaded that he paid the money at the day, which is allowed to be a good plea: *Ergo*, the fee ſimple paſſed by the livery, otherwiſe the plea had amounted that the huſband was never ſeiſed, &c. And ſay they, that it cannot be intended that the judges ſhould be of one opinion in *Trinitie* tearme, and of another opinion in *Michaelmaſſe* tearm in the ſame yeare, and therefore (they hold) their ſeverall opinions are in reſpect of the ſaid diverſitie of the caſes. [*d*] 10 E. 3. 54.

[*e*] 32 *E.* 3. *tit. garr.* 30. A tenant by the curteſie made a leaſe for yeares, and in ſurety of the tearme, &c. made a charter in fee ſimple, and made livery according to the charter (note a ſpeciall mention made of livery in this caſe); and iſſue being taken in an aſſiſe, whether the tenant by the courteſie demiſed in fee, upon the ſpecial matter found, it was adjudged that a fee ſimple paſſed, and that the heire might enter for a forfeiture, which, ſay they, in caſe of livery is an expreſſe judgement in the point agreeing with the opinion of *Littleton*. [*e*] 32 E. 3. tit. garr. 30.

[218. a.]

[*f*] 43 *E.* 3. 35. In an action of waſt againſt one in lands which hee held for tearme of yeares, *Belknap* pleaded thus for the defendant: that the defendant was ſeiſed in fee, and infeoffed the plaintife, [*f*] 43 E. 3. 35.

plaintiſe, &c. and after the plaintiſe demiſed the land back againe to the defendant for yeares upon condition, that if the defendant paid certaine money, &c. that then the defendant might retaine the land to him and to his heires, and if not, the plaintife might enter, &c. and pleaded that the tearme endured, and that the day of payment was not come, and demanded judgement, if the plaintife may maintaine an action of waſte, inaſmuch as the defendant had now a fee ſimple, and ſhewed forth the indenture of leaſe with the condition (which agreeth with *Littleton's* caſe) all being done at one time, and by one deed, and a livery intended, and with *Littleton's* opinion alſo. It is true, ſay they, that *Cavendiſh* accounſell with the plaintiſe offered to demurre, but never proceeded. (g) *Vide* 20 *Aſſ. pl.* 20.

[g] 20 Aſſ. pl. 20.

Other authorities they cite, but theſe (as I take it) are the principall, and therefore for avoyding of tedioufneſſe, having I feare beene too long upon this point, the others I omit. Only this they adde, that *Littleton* had ſeene and conſidered of the ſaid bookes, and have ſet downe his opinion where livery of ſeiſin is made upon a conveyance made at one time, as hath beene ſaid, that he hath fee ſimple conditionall.

Lib. 6. fo. 90. France's caſe. (Dyer 45. Plow. 7. a.)

Benigne lector, utere tuo judicio, nihil enim, impedio. Conditio beneficialis quæ ſtatum conſtruit benignè ſecundum verborum intentionem eſt interpretanda, odioſa autem quæ ſtatum deſtruit ſtrictè ſecundum verborum proprietatem eſt accipienda.

A leaſe is made to a man and a woman for their lives upon condition, that which of them two ſhall firſt marry, that one ſhall have fee, they entermarry, neither of them ſhall have fee, for the incertainty.

(Plo. 481. a. Aut. 206. a. b.)

Note, if the condition be to increaſe an eſtate (that is to ſay) to have fee upon payment of money to the leſſor or his heires at a certaine day, before the day the leſſor is attainted of treaſon or felony, and alſo before the day is executed, now is the condition become impoſſible by the act and offence of the leſſor, and yet the leſſee ſhall not have fee, becauſe a precedent condition to encreaſe an eſtate muſt be performed, and if it become impoſſible, no eſtate ſhall riſe.

Pl. Com. Browning & Beſton's caſe 133. b. (2 Rep. 58. b.)

"*Pur ceo que le grantor ne poet entrer, &c.*" Regularly when any man will take advantage of a condition, if hee may enter hee muſt enter, and when he cannot enter he muſt make a claime, and the reaſon is, for that a free-hold and inheritance ſhall not ceaſe without entry or clayme, and alſo the feoffor or grantor may waive the condition at his pleaſure.

Vid. Littleton cap. Villein.

As if a man grant an advowſon to a man and to his heires upon condition, that if the grantor, &c. pay 20 pound on ſuch a day, &c. the ſtate of the grantee ſhall ceaſe or be utterly void, (1) the grantor payeth the money, yet the ſtate is not reveſted in the grantor before a claime, and that claim muſt be made at the church. (*d*) And ſo it is of a reverſion or remainder of a rent, or common, or the like, there muſt be a claime before the ſtate be reveſted in the grantor by force of the condition, and that claime muſt be made upon the land.

(*d*) Pl. Com. Browning's caſe 133. b.

42 E. 3. 1.

A fortiori, in caſe of a feoffment which paſſeth by livery of ſeiſin, there muſt be a re-entry by force of the condition before the ſtate be voyd.

If

(1) Acc. 2. And. 8.

If a man bargaineth and felleth land by deed indented and inrolled with a *proviſo*, that if the bargainer pay, &c. that then the ſtate ſhal ceaſe and be void, he payeth the money, the ſtate is not reveſted in the bargainer before a re-entry, (2) and ſo it is if a bargain and ſale be made of a reverſion, remainder, advowſon, rent, common, &c. And ſo it is if lands bee deviſed to a man and to his heirs upon condition, that if the deviſee pay not 20 pound at ſuch a day, that his eſtate ſhall ceaſe and be void, the money is not paid, the ſtate ſhall not be veſted in the heir before an entry. And ſo it is of the reverſion or remainder, an advowſon, rent, common, or the like. (3)

Lib. 2. fo. 50. Sir Hugh Cholmley's caſe. (6 Rep. 34. a. b. Plo. 212.)

But the ſaid rule hath divers exceptions. Firſt, in this preſent caſe of *Littleton*, for that he can make no entry, he ſhall not be driven to make any claime to the reverſion: for ſeeing by conſtruction of law the freehold and inheritance paſſeth *maintenant* out of the leſſor; by the like conſtruction, the freehold and inheritance by the default of the leſſee ſhall be reveſted in the leſſor without entrie or claime.

Vid. Lib. 1. fo. 174. Dig's caſe. 20 E. 4. 18. 19.

2. If I grant a rent charge in fee out of my land upon condition, there if the condition be broken, the rent ſhall be extinct in my land, becauſe I (that am in poſſeſſion of the land) need make no claime upon the land, and therefore the law ſhall adjudge the rent voide without any claime.

Pl. Com. Browning's caſe 133 b. 20 E. 4. 19.

3. If a man make a feoffment unto me in fee upon condition that I ſhall pay unto him 20 pound at a day, &c. before the day I let unto him the land for yeares, reſerving a rent, and after faile of payment, the feoffee ſhall retaine the land to him and to his heirs, and the rent is determined and extinct, for that the feoffor could not enter, nor need not claime upon the land, for that he himſelfe was in poſſeſſion, and the condition being collaterall is not ſuſpended by the leaſe, otherwiſe it is of rent reſerved.

20 E. 4. 19. 20 H. 7. 4. b. (4 Rep. 58.) (1 Rep. 97.)

[218. b.]

4. If a man by his deed in conſideration of fatherly love, &c. covenant to ſtand ſeiſed to the uſe of himſelfe for life, and after his deceaſe to the uſe of his eldeſt ſonne in taile, the remainder to his ſecond ſonne in taile, the remainder to his third ſonne in fee, with a *proviſo* of revocation, &c. the father doth make a revocation according to the *proviſo*, the whole eſtate is *maintenant* reveſted in him without entry or claime for the cauſe aforeſaid.

Lib. 1. 174. Digge's caſe. (Parl. Rot. 237. a. 265. b. Ant. 215. a.)

"*Le grantee ad uncore title pur* 3 *ans.*" By this it appeareth that albeit the leſſee had *pro tempore* a fee ſimple, yet after that fee ſimple is deveſted out of him, and veſted in the leſſor, he ſhall hold the lands for three yeares by the expreſſe limitation of the parties.

If a man make a leaſe for 40 years, the leſſee afterwards taketh a leaſe for 20 yeares upon condition that if he doth ſuch an act, that then the leaſe for 20 yeares ſhall be void, and after the leſſee breake the condition, by force whereof the ſecond leaſe is void, notwithſtanding the leaſe for 40 yeares is ſurrendred, for the condition was annexed to the leaſe for 20 yeares, but the ſurrender was abſolute. So it is if a man make a leaſe for 40 yeares, and the leſſor grant the reverſion to the leſſee upon condition, and after the condition is broken, the tearme was abſolutely ſurrendred. And the diverſitie is when the leſſor grants the reverſion to the leſſee upon condition, and when the leſſee grants or ſurrenders his eſtate to the leſſor; for a condition annexed to a ſurrender may reveſt the particular eſtate, becauſe

Pl. Com. in Fulmerſtone's caſe 107. b. (2 Roll. Abr. 494, 495. 497 498, 499.) (5 Rep. 11. a. 1 Roll. Abr. 412.)

7 E. 4. 29. 14 E. 4. 6. 45 E. 3.

(2) [See Note 120.] (3) [See Note 121.]

becauſe the ſurrender is conditionall. But when the leſſor grants the reverſion to the leſſee upon condition, there the condition is annexed to the reverſion, and the ſurrender abſolute. (1)

8 E. 2. Aſſ. 395. A gardian in chivalrie took a feoffment of the infant within age that was in his ward, and the infant brought an aſſiſe, and the gardian ſhall be adjudged a diſſeitor, which proveth that the feoffment as againſt the infant was void, and yet by acceptance thereof the intereſt of the gardian was transferred

50 E. 3. 27. A man maketh a leaſe for termes of life by deed, reſerving the firſt ſeven yeares a rate, and if the leſſee will hold the land after the ſeven yeares, to pay a rent in money; the leſſee will not hold over, but ſurrender his termes: in this caſe in judgement of law he had but a termes for ſeven yeares. And ſo it is if a man make a leaſe for life, and if the leſſee within one yeare pay not 20 ſhillings, that he ſhall have but a termes for two yeares, if hee pay not the money the eſtate for life is determined, and he ſhall have the land but for two yeares.

" *Ceo eſt bone proofe adonques, que le reverſion eſt in luy, &c.*" Here is implyed that no man can have an action of waſte, unleſſe the reverſion be in him, and by the authority of our author the reaſon of a caſe, and well applyed, is a good proofe in law. (2)

Sect. 351.

*MES en tiels caſes de feoffment ſur condition, l'ou le feoffor poit loyalment entrer pur le condition enfreint; &c. * la le feoffor n'ad le franktenement devant ſon entrie, &c.*

BUT in ſuch caſes of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c. there the feoffor hath not the freehold before his entrie, &c. (3)

This upon that which hath beene ſhid is evident, and needeth no further explanation.

Sect. 352.

*ITEM, ſi feoffment ſoit fait ſur tiel condition, que le feoffee donera le terre al feoffor, et a la feme del feoffor, a aver et tener a eux, et a les heires de lour deux corps engendres, et pur default de tiel iſſue, le remainder al droit heires le feoffor. En ceo cas ſi le baron devy, vivant la feme, devant aſcun eſtate en le taile fait a eux, * &c. donques doit le feoffee per la*

ALSO if a feoffment be made upon ſuch condition, that the feoffee ſhal give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heires of their two bodyes engendred, and for default of ſuch iſſue, the remainder to the right heires of the feoffor. In this caſe if the huſband dyeth, living the wife, before

* *ia—l' ou* in L. and M. and Roh.

(1) See alſo Dyer 143. 2 Roll. Abr. 495.
(2) [See Note 122.]
(3) [See Note 123.]
* *&c.* not in L. and M. nor Roh.

*la ley faire eſtate, a la feme cy pres le condition, et auxy cy pres l'entent de le condition que il poit faire, ceſt-aſcavoir, de leſſer la terre al femme pur terme de vie ſans impeachment de waſt, le remainder apres ſon deceaſe a les heires de † corps ſa baron de luy engendres, et pur default de tiel iſſue, le remainder al droit heires le baron. Et la cauſe pur que le leaſe ſerra en ceſt cas a la feme ſole ſans impeachment de waſt, eſt pur ceo que le condition eſt, que l'eſtate ſerra fait al baron et a ſa feme en ‡ taile. Et ſi tiel eſtate uſt eſte fait en le vie le baron, donques apres le mort le baron el ‖ uſt ewe eſtate ent en le taile; quel eſtate eſt ſans impeachment de waſt. Et iſſint il eſt reaſon, que cy pres que kome poit faire eſtate a l'entent de condition, &c. que il ſerroit § fait, &c. comment que ¶ el ne poit aver eſtate en † taile ſicome el ** puiſſoit aver ſi le done en le taile uſt eſtre fait a †† ſa baron et ‡‡ a luy en le vie †† ſa baron.*

before any eſtate in taile made unto them, &c. then ought the feoffee by the law to make an eſtate to the wife as neer the condition, and alſo as neere to the entent of the condition as he may make it, (1) that is to ſay, to let the land to the wife for terme of life without impeachment of waſte, (2) the remainder after his deceaſe to the heires of the body of her huſband on her begotten, (3) and for default of ſuch iſſue, the remainder to the right heires of the huſband. And the cauſe why the leaſe ſhall bee in this caſe to the wife alone without impeachment of waſte is, for that the condition is, that the eſtate ſhal be made to the huſband and to his wife in taile. And if ſuch eſtate had been made in the life of the huſband, then after the death of the huſband ſhee ſhould have had an eſtate in taile, which eſtate is without impeachment of waſte. And ſo it is reaſon, that as neare as a man can make the eſtate to the intent of the condition, &c. that it ſhould bee made, &c. albeit ſhe cannot have eſtate in taile, as ſhe might have had if the gift in taile had been made to her huſband and to her in the life of her huſband, &c.

"QUE *le feoffee doncra, &c.*" Here is no time limited, therefore the feoffee by the law hath time during his life, unleſſe he be haſtened by the requeſt of the feoffor or the heires of his body, as *Littleton* ſaith in the next ſection. 3 Mar. 134. Dyer 14 Eliz. Dyer. 311. b. 2 H. 4. 5. 44 E. 3. 9.

[219. a.]

Lib. 2. fo. 79, 80, 81. in Seignior Cromwel's caſe. (Ant. 208. b. 1 Roll. Abr. 429. 1 Roll. Abr. 614, 615. a.) (2 Rep. 59.)

"*Si le baron devie, &c.*" But in this caſe, if the feoffee dyeth before any feoffment made, then is the condition broken, becauſe he made not the eſtates, &c. within the time preſcribed by the law. But if the feoffment bee made upon condition that the feoffee before the feaſt of St. *Michael* the Archangell next following give the land to the feoffor and to his wife in taile, *ut ſupra*, and before the day the feoffee (Sect. 337.) 15 H. 7. 13. 33 H. 6. 26. 27. 9 Eliz. Dyer 262. Pl. Com. (Sect. 334.)

456. Lib. 2. fo. 79. Seignior Cromwell's caſe.

† *les corps de ſon baron et de luy engendres*, in L. and M. and Roh.
‡ *le* added in L. and M. and Roh.
‖ *uſt ewe—ad ewe*, in L. and M. and Roh.
§ *fait* not in L. and M. nor Roh.
¶ *el—il* in L. and M. and Roh.
† *le* added in L. and M. and Roh.
** *el—il* in L. and M. and Roh.
†† *ſa—ſon* in L. and M. and Roh.
‡‡ *a* not in L. and M. and Roh.
†† *ſa—ſon* in L. and M. and Roh.

(1) [See Note 124.] (2) [See Note 125.] (3) [See Note 126.]

feoffee dieth, the ſtate of the heire of the feoffee ſhall be abſolute, becauſe a certaine time is limited by the mutual agreement of the parties, within which time the condition becommeth impoſſible by the act of God, as hath been ſaid before, and therefore it is neceſſary when a day is limited, to adde to the condition, that the feoffee or his heires doe performe the condition; but when no time is limited, then the feoffee at his perill muſt performe the condition during his life (although there be no requeſt made) or elſe the feoffor or his heires may re-enter.

(1 Roll. Abr. 449. Ant. 206. a.) (2 Rep. 79. a. 6 Rep. 30. b.)

"*Fait a eux, &c.*" Here the (*&c.*) implyeth according to the condition with the remainder over.

"*Al feoffor & a le feme, &c.*" Here it appeareth that albeit the *feme* bee a ſtranger, yet the feoffee is not bound to make it within convenient time, becauſe the feoffor who is privy to the condition is to take joyntly with her. And ſo it is if the condition be to enfeoffe the feoffor and an eſtranger, the feoffee hath time during his life, unleſſe he be haſtened by requeſt. Otherwiſe it is (as hath beene ſaid) where the condition is to enfeoffee a ſtranger or ſtrangers onely.

27 E. 3. Dower 135. Seignior Cromwell's caſe ubi ſupra. (6 Rep. 30. b.) [219. b.]

(1 Roll. Abr. 452.)

If a man make a feoffment in fee, upon condition that the feoffee ſhall make a gift in taile to the feoffor, the remainder to a ſtranger in fee, there the feoffee hath time during his life, as is aforeſaid, becauſe the feoffor who is partie, and privy to the condition, is to take the firſt eſtate. But if the condition were to make a gift in taile to a ſtranger, the remainder to the feoffor in fee, there the feoffee ought to doe it in convenient time, for that the ſtranger is not privy to the condition, and he ought to have the profits preſently, as before hath beene ſaid.

(1 Roll. Abr. 428.)

Seignior Cromwell's caſe ubi ſupra. (2 Rep. 79. Ant. 208. b.)

"*De faire eſtate al feme cy pres le condition, et auxy cy pres l'entent del condition que il poit faire, &c.*"

A. infeoffe *B.* upon condition that *B.* ſhall make an eſtate in frankmariage to *C.* with one ſuch as is the daughter of the feoffor; in this caſe he cannot make an eſtate in frankmarriage, becauſe the eſtate muſt move from the feoffee, and the daughter is not of his blood, but yet he muſt make an eſtate to them for their lives, for this is as neer the condition as he can. And ſo it is if the condition be, to make to *A.* (which is a meer layman) an eſtate in frankalmoigne, yet muſt he make an eſtate to him for his life, for the reaſon here yeelded by *Littleton.*

(Ant. 21. b.)

A diverſitie is to be underſtood between conditions that are to create an eſtate, and conditions that are to deſtroy an eſtate: for here it appeareth, that a condition that is to create an eſtate, is to be performed by conſtruction of law, as neere the condition as may be, and according to the entent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwiſe it is of a condition that deſtroyeth an eſtate, for that is to be taken ſtrictly, unleſſe it be in certaine ſpeciall caſes: and of this ſomewhat hath beene ſaid before in this chapter.

(1 Roll. Abr. 426. Plow. 7. a. Dyer 45. a.)

As if a man morgage his land to *W.* upon condition, that if the morgageor and *I. S.* pay twenty ſhillings at ſuch a day to the morgagee, that then he ſhall re-enter, the morgageor dieth before the day, *I. S.* paies the money to the morgagee, this is a good performance of the condition, and yet the letter of the condition is not performed.

30 H. 8. tit. Condit. Br. 190. 37. H. 8. tit. Joint Br. 62.

formed. But if the morgageor had been alive at the day, and he would not pay the money, but refuſed to pay the ſame, and *I. S.* alone had tendred the money, the morgagee might have refuſed it. But if a man make a leaſe to two for yeares, with a *proviſo*, if the leſſees dye during the tearm, the leſſor ſhall re-enter, one leſſee alien his part and dye, the other leſſee cannot re-enter, but the aſſignee ſhall enjoy the tearm ſo long as the ſurvivor liveth, and the reaſon is, becauſe the leaſe by the *proviſo* is not to ceaſe til both be dead. But in the former caſe, albeit the morgageor be dead, yet the act of God ſhall not diſable *I. S.* to pay the money, for thereby the morgagee receives no prejudice. And ſo it is in that caſe, if *I. S.* had died before the day, the morgageor might have paid it.

And here is to be obſerved a diverſity when the feoffee dyeth, for then (as hath been ſaid) the condition is broken, and when the feoffor dyeth, for then the eſtate is to be made as neer the intent of the condition as may be. Lib. 2. fo. 79, 80, 81. Seignior Cromwel's caſe. 2 H. 4. 5.

"*Al ſeme pur terme de ſa vie ſans impeachment de waſt.*"

Here it appeareth, that this eſtate for life ought to be without impeachment of waſt, and yet if the wife doth accept of any eſtate for life without this clauſe, without impeachment of waſt, it is good, becauſe the ſtate for life is the ſubſtance of the grant, and the privilege to be without impeachment of waſt is collaterall, and onely for the benefit of the wife, and the omiſſion of it onely for the benefit of the heire. (1) 2 H. 4. 5. Seignior Cromwel's caſe ubi ſupra.

Alſo if the wife take huſband before requeſt made, and then they make requeſt, and the ſtate is made to the huſband and wife, during the life of the wife, this is a good performance of the condition, albeit the eſtate be made to the huſband and wife, where *Littleton* ſaith it is to be made to the wife, but it is all one in ſubſtance, ſeeing that the limitation is during the life of the wife. (1 Sid. 268. 303, 304. 442. Ant. 207. a. Cro. El. 45.) (1 Roll. Abr. 426.)

[220. a.]

"*Sauns impeachment de waſt,*" *Abſque impetitione vaſti*, (that is) without any challenge or impeachment of waſte, and by force hereof the leſſee may cut downe the trees and convert them to his owne uſe. Otherwiſe it is if the words were *ſauns impeachment per aſcun action de waſt*, for then the diſcharge extends but to the action, and not to the trees themſelves, and in that caſe the leſſor ſhall have them (1). (Cro. Car. 242.) (Cro. Jac. 216.) See in my Reports lib. 11. fo. 83. lib. 9. fo. 9. li. 2. 23.

And it is to be obſerved, that after the deceaſe of the huſband the ſtate is not to be made to the wife and the heires of her body by her late huſband ingendred, and ſo to have an eſtate of inheritance as ſhe ſhould have had by ſurvivor, if the eſtate had bin made according to the condition, but only an eſtate for life without impeachment of waſt, &c. for that by the authoritie of *Littleton* is not ſo neere the intent of the condition as the caſe that *Littleton* putteth. But I will ſearch no further into this caſe, but leave it to the learned and judicious reader. (4 Rep. 63. a.)

"*Et apres ſon deceaſe a les heires del corps le baron de luy engendres.*" (Ant. 20. b. 26. b. 27. a.)

Note here, admit that there were two iſſues in taile, the remainder ſhal preſently veſt only in the eldeſt, and yet if hee dieth without iſſue, it ſhall *per formam doni* veſt in the youngeſt, as hath beene ſaid in

(1) [See Note 227.]

[220. a.]

(1) [See Note 228.]

in the chapter of Eſtate taile: (2) and ſo it is *tacitè* proved here, for otherwiſe the condition (if there were two iſſues) could not be performed.

Sect. 353.

ITEM en ceſt caſe ſi le baron et la feme ont iſſue, et deviont devant le done en le taile fait a eux, &c. donques le feoffee doit faire eſtate al iſſue et a les heires de corps ſon pere et ſon mere engendres, et pur default de tiel iſſue, le remainder a les droit heires le baron, &c. Et meſme la ley eſt en auters caſes ſemblables. Et ſi tiel feoffee ne voet faire tiel eſtate, &c. quant il eſt reaſonablement requiſe per eux que devoyent aver eſtate per force de le condition, &c. donque poet le feoffor ou ſes heires entrer.*

ALSO in this caſe if the huſband and wife have iſſue, and die before the gift in taile made to them, &c. then the feoffee ought to make an eſtate to the iſſue, and to the heires of the body of his father and his mother begotten, and for default of ſuch iſſue, &c. the remainder to the right heires of the huſband, &c. And the ſame law is in other like caſes: and if ſuch a feoffee will not take ſuch eſtate, &c. when he is reaſonably required by them which ought to have the ſtate by force of the condition, &c. then may the feoffor or his heires enter.

"*QUANT il eſt reaſonablement requiſe per eux queux devoyent aver eſtate per force de le condition.*" Note here it appeareth, that the feoffee hath time during his life to make the eſtate, unleſſe he be reaſonably required by them that are to take the eſtate. This is to be intended of parties or privies, and not of meere ſtrangers, for there (as hath beene ſaid) the ſtate muſt be made in convenient time.

(2 Rep. 78. b. 79.)

(Ant. 222. b. 214. b. 208. b.)

And concerning the requeſt it is to be knowne, that when the requeſt is made, the party or privy muſt requeſt the feoffee at a time certain to be upon the land, and to make the ſtate according to the condition, for ſeeing no time certain is preſcribed for the making of the ſtate, and it is incertain when the requeſt ſhall bee made, ſuch requeſt and notice muſt be made as hath bin ſaid before in this chapter. And of this ſection, with the (*&c.*) there needeth not, upon that which hath beene ſaid, any farther explication.

(8 Rep. 89. b.)

Sect. 354. [220. b.]

ITEM ſi feoffment ſoit fait ſur condition, que le feoffee† re-infeoffera pluſors homes, a aver et tener a eux

ALSO if a feoffment bee made upon condition, that if the feoffee ſhall re-enfeoffe many men, to have

* *&c.* added in L. and M. and Roh. † *re-infeoffera—infeoffera*, L. and M. and Roh.

(2) See 1 Rep. 95. 3 Rep. 61. 11 Rep. 80. and the note page 488. in Mr. Douglas's Reports.

eux et a lour heires a touts jours, et touts ceux que devoient aver eſtate moront devant aſcun eſtate fait a eux, donque doit le feoffee faire eſtate al heire celuy que ſurveſquiſt de eux, a aver et tener a luy et a les heires celuy que ſurveſquiſt †.

have and to hold to them and to their heirs for ever, & all they which ought to have eſtate dye before any eſtate made to them, then ought the feoffee to make eſtate to the heire of him which ſurvives of them, to have and to hold to him and to the heires of him which ſurviveth (1).

"*QUE le feoffee re-infeoffera pluſors homes.*" By the re-feoffment it is implied to be made to the feoffors, for a feoffement over to ſtrangers cannot be ſaid a re-feoffement, and if the feoffement ſhould be made over to ſtrangers onely, then, as hath beene often ſaid, it muſt be made in convenient time. (2 Rep. 70.)

"*Al heire celuy que ſurveſquiſt, a aver & tener a luy & a les heires celuy que ſurveſquiſt.*" Hereupon queſtions have beene made, wherefore the *habendum* is not to the heires of the heire, and for what reaſon it is by *Littleton* limited to the heires of the ſurvivor. And the cauſe is, for that if it were made to the heires of the heire, then ſome perſons by poſſibility ſhould be inheritable to the land, which ſhould not have inherited if the eſtate had beene made to the ſurvivor and his heires, and conſequently the condition broken.

For example, if the ſurvivor tooke to wife *Alice Fairefield*, in this caſe if the limitation were to the ſonne and his heires, then if the ſonne ſhould dye without heires of his father, the blood of the *Fairefields* (being the blood of his mother) ſhould inherit. But if the limitation be to the right heires of the father, then ſhould not the blood of the *Fairefields* by any poſſibility inherit, for then it is as much as if the ſtate had beene made to the ſurvivor and his heires; and therefore theſe words (*et à les heires celuy que ſurveſquiſt*), which many have thought ſuperfluous, are verie materiall. Note well this kind of fee ſimple, for it is worthy the obſervation: but ſufficient hath beene ſaid to open the meaning of *Littleton*, and therefore I will dive no deeper into this point, but leave it to the further conſideration of the learned reader (2). (Ant. 12. a.) (Vide Sect. 4.)

Sect. 355.

ITEM ſi feoffment ſoit fait ſur condition d'enfeoffer un auter, ou de doner en ‖ *taile a un auter, &c. ſi le feoffee devant le performance del condition enfeoffa un eſtranger, ou fait un leaſe pur terme de vie, donques poet le feoffor et ſes heires entrer, &c. pur ceo que il ad luy meſme diſable de performer*

ALSO if a feoffement be made upon condition to enfeoffe another, or to make a gift in taile to another, &c. if the feoffee before the performance of the condition enfeoffe a ſtranger, or make a leaſe for life, then may the feoffor and his heirs enter, &c. becauſe he hath diſabled himſelfe

† *&c.* added in L. and M. and Roh.
‖ *de* not in L. and M. nor Roh.
‖ *le* added in L. and M. and Roh.

(1) [See Note 129.]
(2) See the note 2, on page 12. b.

performer le condition entant que il ad fait eſtate a un auter, &c.

(1) himſelfe to performe the condition, inaſmuch as he hath made an eſtate to another, &c.

LITTLETON having ſpoken of defaults of performance, or expreſſe breaches of conditions, ſpeaketh now in what caſes the feoffee in judgement of law doth diſable himſelfe to perform the condition: and of diſabilities ſome bee by act of the party, and ſome by act in law.

"*Ou a doner en taile á un auter, &c.*" Here is implied an eſtate for life or for yeares, &c.

13 H. 7. 23. b. 32 E. 3. barre 264. 21 Aſſ. 28. 38 Aſſ. pl. 7.

"*Enfeoffe un eſtranger ou fait un leaſe pur terme de vie.*" This is a diſabilitie by the act of the partie, for herein the feoffee hath diſabled himſelf to make the feoffment or other eſtate according to the condition. And to ſpeake once for all, the feoffee is diſabled when he cannot convey the land over according to the condition in the ſame plight, qualitie, and freedome as the land was conveyed to him, for ſo the law requireth the ſame, as ſhall manifeſtly appeare hereafter. And here where our author ſpeaketh of a feoffment, he includeth an eſtate taile as well as the fee ſimple. [221. a.

(2 Rep. 59. 1 Roll. Abr. 447.)

(4 Rep. 52.) (5 Rep. 95.)

Sect. 356.

EN meſme le manner eſt, ſi le feoffee, devant le condition performe, leſſa meſme la terre a un eſtranger pur terme des ans; en ceſt caſe le feoffor et ſes heires poyent entrer, &c. pur ceo que le feoffee ad luy diſable de faire eſtate de les tenements accordant a ceo que eſtoit en les tenements, quant eſtate ent fuit fait a luy. Car ſ'il voile faire eſtate de les tenements accordant a le condition, &c. donques poit le leſſee pur terme d'ans enter et ouſte meſme celuy a que l'eſtate eſt fait, &c. et occupier ceo durant ſon terme†.*

IN the ſame manner it is, if the feoffee, before the condition performed, letteth the ſame land to a ſtranger for tearme of yeares; in this caſe the feoffor and his heires may enter, &c. becauſe the feoffee hath diſabled him to make an eſtate of the tenements according to that which was in the tenements, when the ſtate thereof was made unto him. For if hee will make an eſtate of the tenements according to the condition, &c. then may the leſſee for yeares enter and ouſt him to whom the eſtate is made, &c. and occupy this during his tearme.

"*SI le feoffee devant le condition performe leſſa meſme la terre a un eſtranger pur terme des ans, &c.*" Here the *&c.* implyeth a leaſe to take effect *in futuro* as well as *in præſenti*, alſo a leaſe for one yeare or half a yeare, &c.

The reaſon of this is evidently ſet downe before. And againe, of diſabilities ſome be by act *in præſenti*, whereof *Littleton* hath put two examples, and ſome *in futuro*, whereof now hee will ſpeake in the next Section.

* *de les tenements* not in L. and M. nor Roh. † *&c.* added in L. and M. and Roh.

(1) Upon the doctrine of this and the three following Sections, ſee Vin. Abr. vol. 5. p. 221, 225.

Sect.

Sect. 357.

*ET pluſors ont dit, que ſi tiel feoffment ſoit fait a un home ſole ſur meſme condition, et devant que il ad performe meſme la condition il prent feme, * donques le feoffor et ſes heires maintenant poient entrer, pur ceo que s'il ſeſoit eſtate accordant a la condition, et puis moruſt, donques † la feme ſerra endowe, et poit recover ſa dower per briefe de dower, &c. et iſſint per le priſel del feme les tenements ſont mis en un auter plite que ne fueront al temps de feoffment ſur condition, pur ceo que adonques nul tiel ‡ feme fuit dowable, ne ſerroit dowe per la ley, &c.*

AND many have ſaid, that if ſuch feoffment be made to a ſingle man upon the ſame condition, and before hee hath performed the ſame condition he taketh wife, then the feoffor and his heires *maintenant* may enter, becauſe, if he hath made an eſtate according to the condition, and after dieth, then the wife ſhall be endowed, and may recover her dower by a writ of dower, &c. and ſo by the taking of a wife, the tenements bee put in another plight then they were at the time of the feoffment upon condition, for that then no ſuch wife was dowable, nor ſhould bee endowed by the law, &c.

FIRST, here is an example of a diſability both by act in law and *in futuro*, for by mariage the wife is entitled by law to dower, after the death of her huſband.

Secondly, it [a] appeareth that albeit the wife by the marriage [221. b] is but intitled to have dower, and the eſtate which ſhe is to have *in futuro*, viz. after the deceaſe of her huſband, yet it is a preſent cauſe of entrie. As a leaſe for yeares to begin at a day to come is a preſent diſabilitie and cauſe of re-entrie, for that the land is not in that freedome and plight as it was conveyed to the feoffee, and after the ſtate made over according to the condition the land ſhall be charged therewith.

[a] 13 H. 7. 23. b. 34 E. 3. dower 127. M. 27 E. 3. tit. dower 135. 28 Aſſ. Pl. 4. 11 H. 7. 7. 6. lib. 2. fol. 59. b. (5 Rep. 20. b. 21. a.) Julius Winnington's caſe, lib. 2. fol. 59, 60. (1 Roll. Abr. 447.)

"*En un auter plight.*" Plight is an old Engliſh word, and here ſignifieth not onely the eſtate but the habit and qualitie of the land, and extendeth to rent charges, and to a poſſibility of dower. *Vide* Sect. 289, where plight is taken for an eſtate or intereſt of and in the land it ſelfe, and extendeth not to a rent charge out of the land.

"*A un home ſole.*" For if the feoffee were married at the time of the feoffement, then the dower can bee no diſabilitie, becauſe the land ſhall remaine in ſuch plight as it was at the time of the feoffment made unto him.

"*Donques le feoffor et ſes heires maintenant poient entrer.*" Here it appeareth, that ſeeing that for this title or poſſibilitie the feoffor may preſently enter, that albeit the wife happen to dye before the huſband,

* *donques—que* in L. and M. and Roh.
† *la—ſa* in L. and M. and Roh.
‡ *feme* not in L. and M. nor Roh.

huſband, ſo as this title or poſſibilitie tooke no effect, yet the feoffor may re-enter, for the feoffee being diſabled at any time though the ſame continue not, yet the feoffor may re-enter, for in that caſe he that is once diſabled is ever diſabled. And herein a diverſitie is to be obſerved betweene a diſabilitie for a time on the part of the feoffee, and a diſability for a time of the part of the feoffor. For if a man maketh a feoffment in fee, upon condition that the feoffee before ſuch a day ſhall re-infeoffee the feoffor, the feoffee taketh wife, and the wife dyeth before the day, yet may the feoffor re-enter.

(5 Rep. 21. a.)

21 E. 4. 55.

So it is if the feoffee before the day entreth into religion, and is profeſſed, and before the day is deraigned, yet the feoffor may re-enter.

So it is if the feoffee before the day make a feoffment in fee, and before the day take back an eſtate to him and his heires, yet the feoffor may re-enter.

Albeit in theſe caſes a certaine day is limited, yet the feoffee being once diſabled is ever diſabled. And ſo it is when no time is limited by the parties, but the time is appointed by the law.

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certaine ſum of money before ſuch a day, the feoffor commit treaſon, is attainted and executed, now is there a diſabilitie on the part of the feoffor, for he hath no heir; but if the heire be reſtored before the day he may performe the condition, as it was reſolved* *Trin.* 18 *Eliz. in Communi Banco* in ſir *Thomas Wiat's* caſe, which I heard and obſerved. Otherwiſe it is if ſuch a diſabilitie had growne on the part of the feoffee; and the reaſon of the diverſitie is, for that, as *Littleton* ſaith, *maintenant* by the diſabilitie of the feoffee, the condition is broken, and the feoffor may enter, but ſo it is not by the diſability of the feoffor, or his heires; for if they performe the condition within the time, it is ſufficient, for that they may at any time performe the condition before the day. And ſo it is if the feoffor enter into religion, and before the day is deraigned, he may performe the condition for the cauſe aforeſaid. *Et ſic de ſimilibus.* The (*&c.*) in this Section are ſufficiently explaned. [222. a.]

(2 Rep. 79. a.)

*Trin. 18 Eliz. in Communi Banco in Sir Thomas Wiat's caſe.

(Plo. 553. a. 554. Cro. Car. 427. Hob. 334.)

Sect. 358.

EN meſme le maner eſt, ſi le feoffee charge la terre per ſon fait d'un rent charge devant le performance del condition, ou ſoit oblige en un eſtatute de le ſtaple, ou ſtatute merchant, en tielx caſes le feoffor et ſes heires poyent entrer, &c. cauſâ quâ ſuprà. *Car quecunque que venuſt a les tenements per le feoffment de le feoffee,* * *eux covient eſtre liables, et eſtre mis en execution per force de l'eſtatute merchant ou de ſtatute del ſtaple.* † Quære. *Mes quant le feoffor*

IN the ſame manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a ſtatute ſtaple, or ſtatute merchant, in theſe caſes the feoffor and his heires may enter, &c. *cauſâ quâ ſuprà.* For whoſoever commeth to the lands by the feoffment of the feoffee, they ought to be lyable, and put in execution by force of the ſtatute merchant, or of the ſtatute ſtaple. *Quære.* But when the feoffor

* *eux—donques les tenements,* L. and M. and Roh.

† *Quære—&c.* L. and M. and Roh.

feoffor ou ſes heires, pur les cauſes avant dits, averont entrer, come ils devoyent, come il ſemble, &c. donques touts tiels choſes que devant tiel entrie puiſſent troubler ou encumber les tenements iſſint dones ſur condition, &c. quant a meſmes les tenements ſont outterment defeats.

feoffor or his heires, for the cauſes aforeſaid, ſhal have entred, as it ſeemes they ought, &c. then all ſuch things which before ſuch entry might trouble or incumber the land ſo given upon condition, &c. as to the ſame land, are altogether defeated.

"*POYENT entrer, &c.*" And here it is to be underſtood, that the grant of the rent charge is a preſent diſability of the feoffee, and therefore albeit the grantee doth bring a writ of annuitie, and diſcharge the land of it, *ab initio*, yet the cauſe of entrie being once given by the act of the feoffee the feoffor may re-enter. And ſo it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter. (1 Roll. Abr. 447.)

The like law is of any judgement given againſt the feoffee wherin debt or dammages are recovered. (5 Rep. 20. b.)

13 H. 7. 23. b. 44 E. 3. 9. b. 20 E. 3. 73. 20 H. 6. 34. Julius Wynnington's caſe ubi ſupra.

"*Cu ſoit oblige en un ſtatute de la ſtaple, &c.*" If the feoffee be diſſeiſed, and after bind himſelf in a ſtatute ſtaple, or merchant, or in a recognizance, or take wife, this is no diſabilitie in him, for that during the diſſeiſin the land is not charged therewith, neither is the land in the hands of the diſſeiſor liable thereunto. And in that caſe if the wife die, or the conuſee releaſe the ſtatute or recognizance, and after the diſſeiſe doth enter, there is no diſabilitie at all, becauſe the land was never charged therewith, and therefore in that caſe the feoffee may enter and performe the condition in the ſame light and freedome as it was conveyed unto him.

Lib. 2. fo. 59, 60. Julius Wynnington's caſe. (2 Rep. 79. a. 10 Rep. 49. b.)

And it is to be obſerved, that *Littleton* putteth theſe caſes as examples, for there are ſome other diſabilities implyed, that are not here expreſſed.

18 Aſſ. Pl. ult. 19 E. 3. 39. Lib. 2. fo. 80. b. Signor Cromwel's caſe. (4 Rep. 119.)

The lord *Clifford* did hold his barony and the ſherifwick of *Weſtmerland* of the king by grand ſerjanty *in capite*, and the king gave him licence that he might infeoffe thereof divers chaplains in fee, ſo that they ſhould give the ſame to the lord *Clifford* and the heires

[222. b.] males of his body, the remainder over, &c. the lord *Clifford* according to the licence infeoffed the chaplains, and before they made the reconveyance the lord *Clifford* dyed, and it was adjudged that the heir might enter for the condition broken. For in this caſe the feoffees were bound by law to have made the gift in taile to the lord *Clifford* himſelfe, albeit hee never made any requeſt, for otherwiſe they purſued not the licence, and if they ſhould make the ſtate to the iſſue of the lord *Clifford*, then might the king ſeiſe the barony, &c. for default of a licence, and that in default of the feoffees. And then the ſame ſhould not be in the ſame plight and freedome as it was at the time of the feoffement made upon condition, which is worthy of obſervation.

(Ant. Sect. 354. 1 Roll. Abr. 454.)

If a man grant an advowſon upon condition that the grantee ſhall regrant the ſame to the grantor in taile; in this caſe, if the church become void before the regrant, or before any requeſt made by the grantor, he may take advantage of the condition, becauſe the advowſon is not in the ſame plight as it was at the time of the grant upon condition. And ſo was it reſolved, (*) *Paſch. 14 Eliz. in Communi*

(2 Rep. 79. 1 Leo. 167.)

(*) Paſch. 14 Eliz. 311. Dier.

Communi Banco, betweene *Andrewes* and *Blunt*, which I heard and obſerved, and which my lord *Dier* hath omitted out of his report of that caſe, and therefore the grantee in that caſe at his perill muſt regrant it before the church become voide, or elſe he is diſabled, otherwiſe he hath time during his life if he be not haſtened by requeſt.

44 E. 3. 9. If the feoffee ſuffer a recovery by default upon a faigned title, before execution ſued the feoffor may re-enter for this diſability. *Et ſic de ſimilibus.*

Sect. 359.

ITEM, ſi un home fait un fait de feoffment a un auter, et en le fait eſt nul condition, &c. et quant le feoffor a luy voyle faire liverie de ſeiſin per force de meſme le fait, il fait d'luy le livery de ſeiſin ſur certaine condition; en ceſt cas rien de les tenements paſſa per le fait, pur ceo que le condition n'eſt compriſe deins le fait, et le feoffment eſt eu tiel force ſicome nul tiel fait uſt eſte fait.*

ALSO, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. and when the feoffor will make liverie of ſeiſin unto him by force of the ſame deed, hee makes livery of ſeiſin unto him upon certain condition; in this caſe nothing of the tenements paſſeth by the deed, for that the condition is not compriſed within the deed, and the feoffment is in like force as if no ſuch deed had beene made.

"*ET en le fait eſt nul condition, &c.*" either in deed or in law.

(4 Rep. 25. a) 18 E. 3. 19. 36. 17 Aſſ. p. 20. 8 H. 5. 8. 27 H. 6. "*Et le feoffment eſt en tiel force ſicome nul tiel fait uſt eſte fait.*" And the reaſon hereof is, for that the eſtate paſſeth by the livery of ſeiſin (1). And in this caſe the feoffor upon the deliverie of ſeiſin muſt expreſſe the ſtate to him and his heirs, or to the heires of his body, &c.

34 Aſſ. pl. 1. If an agreement bee made betweene two, that the one ſhall enfeoffee the other upon condition in ſurety of the paiment of certaine money, and after the livery is made to him and his heires generally, the ſtate is holden by ſome to be upon condition, inaſmuch as the intent of the parties was not changed at any time, but continued at the time of the livery (2).

13 E. 3. tit. Eſtoppell 177. 19 E. 3. ibid. 184. If a man make a charter of feoffment in fee, and the feoffor deliver ſeiſin for life, the feoffee ſhall hold it but for life; but if the livery be expreſly for life, and alſo according to the deed, the whole fee ſimple ſhall paſſe, becauſe it hath a reference to the deed,

* *&c.* added in L. and M. and Roh.

(1) Vid. ant. 48. (2) [See Nott 130.]

Sect.

Sect. 360.

*ITEM, ſi feoffment ſoit fait ſur tiel condition, que le feoffee ne alienera la terre a nulluy, ceſt condition eſt voide, pur ceo que quant home eſt enfeoffe * de terres ou tenements, il ad power de eux aliener a aſcun perſon per la ley. Car ſi tiel condition ſerroit bone, donque la condition luy ouſteroit de tout le power que la ley luy dona, le quel ſerroit enconter reaſon, & pur ceo tiel condition eſt voyde.*

ALSO, if a feoffment be made upon this condition, that the feoffee ſhall not alien the land to any, this condition is void, becauſe when a man is infeoffed of lands or tenements, he hath power to alien them to any perſon by the law. For if ſuch a condition ſhould bee good, then the condition ſhould ouſt him of all the power which the law gives him, which ſhould be againſt reaſon, and therefore ſuch a condition is voide.

[223. a.] "*ITEM, ſi feoffment ſoit fait, &c.*" And the like law is of a deviſe in fee upon condition that the deviſee ſhall not alien(1), the condition is voide, and ſo it is of a grant, releaſe, confirmation, or any other conveyance whereby a fee ſimple doth paſſe. For it is abſurd and repugnant to reaſon that he, that hath no poſſibility to have the land revert to him, ſhould reſtrain his feoffee in fee ſimple of all his power to alien. And ſo it is if a man bee poſſeſſed of a leaſe for yeares, or of a horſe, or of any other chatteli reall or perſonall, and give or ſell his whole intereſt or propertie therein upon condition that the donee or vendee ſhal not alien the ſame, the ſame is void, becauſe his whole intereſt and propertie is out of him, ſo as he hath no poſſibilitie of a reverter, and it is againſt trade and traffique, and bargaining and contracting betweene man and man: and it is within the reaſon of our author that it ſhould ouſter him of all power given to him. *Iniquum eſt ingenuis hominibus non eſſe liberam rerum ſuarum alienationem*; and *rerum ſuarum quilibet eſt moderator, & arbiter.* And againe, *regulariter non valet pactum de re meâ non alienandâ.* But theſe are to be underſtood of conditions annexed to the grant or ſale it ſelfe in reſpect of the repugnancy, and not to any other collaterall thing, as hereafter ſhall appeare. Where our author putteth his caſe of a feoffment of land, that is put but for an example: for if a man be ſeiſed of a ſeigniory, or a rent, or an advowſon, or common, or any other inheritance that lyeth in grant, and by his deed granteth the ſame to a man and to his heirs upon condition that he ſhall not alien, this condition is voide. But ſome have ſaid that a man may grant a rent charge newly created out of lands to a man and to his heires upon condition that he ſhall not alien that, that is good, becauſe the rent is of his owne creation; but this is againſt the reaſon and opinion of our author, and againſt the height and puritie of a fee ſimple.

A man before the ſtatute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heires did alien without licence, that he ſhould pay a fine, then this had been good.

(Ant. 206. 1 Rep. 85. 21 H. 6. 34. a. 8 H. 7. 10. b. 33 Aſſ. 11. 24. Doct. and Stud. 39. 124. 13 H. 7. 23. (5 Rep. 56. a.) Argumentum ex abſurdo. Vide Sect. 722.

(10 Rep. 39. Hob. 170.)

14 H. 4. 13 H. 7. 23.

* *de—tn*, L. and M.

(1) [See Note 131.]

21 H. 7. 3. lib. 5. 56. Knight's caſe.

good. And ſo it is ſaid, that when the lord might have reſtrained the alienation of his tenant by condition, becauſe the lord had a poſſibilitie of reverter; and ſo it is in the king's caſe at this day, becauſe he may reſerve a tenure to himſelfe.

If *A.* be ſeiſed of Black Acre in fee, and *B.* infeoffeth him of White Acre upon condition that *A.* ſhall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ouſteth not the feoffee of his power to alien the land whereof the feoffment is made, and ſo no repugnancy to the ſtate paſſed by the feoffment; and ſo it is of gifts, or ſales of chattels reals or perſonals.

Sect. 361.

MES ſi le condition ſoit tiel, que le feoffee ne alienera a un tiel, noſmant ſon noſme, ou a aſcun de * *ſes heires, ou de iſſues d'un tiel, &c. ou hujuſmodi, les queux conditions ne tollent tout la power d'alienation del feoffee, &c. donque tiel condition eſt bone.*

BUT if the condition be ſuch, that the feoffee ſhal not alien to ſuch a one, naming his name, or to any of his heires, or of the iſſues of ſuch a one, &c. or the like, which conditions doe not take away all power of alienation from the feoffee, &c. then ſuch condition is good.

Pl. Com. 77. a. 8 H. 7. 10. b. 21 E. 4. 47. a. (Dyer 45. a. 11 Rep. 74. a.)

IF a feoffment in fee bee made upon condition that the feoffee ſhall not infeoffe *I. S.* or any of his heires or iſſues, &c. this is good, for he doth not reſtraine the feoffee of all his power: the reaſon here yeelded by our author is worthy of obſervation. And in this caſe if the feoffee enfeoffe *I. N.* of entent and purpoſe that [223. b.] hee ſhall infeoffe *I. S.* ſome hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur & per obliquum.*

10 H. 7. 11. Doct. and Stud. 124. 13 H. 7. 23. Bracton lib. 1. fol. 13. a.

If a feoffment bee made upon condition that the feoffee ſhall not alien in mortmaine, this is good, becauſe ſuch alienation is prohibited by law, and regularly whatſoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in ſe*. In ancient deeds of feoffment in fee there was moſt commonly a clauſe, *quòd licitum ſit donatori rem datam dare vel vendere cui voluerit, exceptis viris religioſis & Judæis.*

Sect. 362.

ITEM, ſi tenements ſoient donees en le taile ſur tiel condition, que le tenant en le taile ne ſes heires † ne alieneront en fee, ‡ ne en le taile, ne pur terme d'auter vie, forſque pur lour vies demeſne, &c. tiel condition eſt bone. Et la cauſe eſt, pur ceo que quant

ALSO, if lands bee given in taile upon condition, that the tenant in taile nor his heires ſhall not alien in fee, nor in taile, nor for terme of another's life, but only for their owne lives, &c. ſuch condition is good. And the reaſon is, for that when

* *ſes* not in L. and M.
† *&c.* added in L. and M.
‡ *ne—eu* in L. and M.

quant il fiſt tiel alienation et diſcontinuance de le taile il fait le contrarie a l'entent le donor, pur que l'eſtatute de W. 2. ‖ cap. 1. *fuit fait, per que l'eſtatute les eſtates en le taile ſont ordeines.*

when hee maketh ſuch alienation and diſcontinuance of the entaile, hee doth contrary to the intent of the donor, for which the ſtatute of *W.* 2. *cap.* 1, was made, by which ſtatute the eſtates in taile are ordained (1).

NOTE here, the double negative in legall conſtruction ſhall not hinder the negative, *viz. ſub conditione quòd ipſe nec hæredes ſui non alienarent.* And therefore the grammaticall conſtruction is not alwayes in judgment of law to be followed. 33 Aſſ. 11. 24. lib. 6. 40, 41. Mildmaye's caſe 21 H. 6. 33. 13 H. 7. 23. Cro. Jac. 307.

21 H. 7. 11. Vid. Sect. 220. acc. (Cro. Car. 555. Hob. 191. Ant. 146. b. 10 Rep. 130. 4 Rep. 14.)

" *Forſque pur lour vies demeſne, &c.*" And yet if a man make a gift in taile, upon condition that he ſhall not make a leaſe for his owne life, albeit the ſtate be lawfull, yet the condition is good, becauſe the reverſion is in the donor. As if a man make a leaſe for life or years upon condition, that they ſhall not grant over their eſtate or let the land to others, this is good, and yet the grant or leaſe ſhould bee lawfull. (*) If a man make a gift in taile upon condition that he ſhall not make a leaſe for three lives or 21 yeares according to the ſtatute of 32 *H.* 8. the condition is good, for the ſtatute doth give him power to make ſuch leaſes, which may be reſtrained by condition, and by his owne agreement; for this power is not incident to the eſtate, but given to him collaterally by the act, according to that rule of law, *quilibet poteſt renunciare juri pro ſe introducto.* (6 Rep. 43. a. contra.) 21 H. 6. 33. 13 H. 7. 23, 24. 27 H. 8. 17. 19. 31 H. 8. Dyer 45. (3 Rep. 64.) (*) Dier 33 H. 8. fo. 48, 49. (10 Rep. 38, 39. 1 Roll. Abr. 418.)

" *Quant il fiſt tiel alienation & diſcontinuance del ſtate taile.*" And therefore if a gift in taile be made upon condition, that the donee, &c. ſhall not alien, this condition is good to ſome intents, and void to ſome; for, as to all thoſe alienations which amount to any diſcontinuance of the ſtate taile (as *Littleton* here ſpeaketh;) or is againſt the ſtatute of *Weſtminſter* 2, the condition is good without queſtion. But as to a common recoverie the condition is voyd, becauſe this is no diſcontinuance, but a barre, and this common recovery is not reſtrained by the ſaid ſtatute of *W.* 2. And therefore ſuch a condition is repugnant to the eſtate taile; for it is to be obſerved, that to this eſtate taile there be divers incidents. Firſt, to be diſpuniſhed of waſt. Secondly, that the wife of the donee in taile ſhall be endowed. Thirdly, that the huſband of a feme donee after iſſue ſhal be tenant by the curteſie. Fourthly, that tenant in taile may ſuffer a common recoverie (1): and therefore if a man make a gift in taile, upon condition to reſtraine him of any of theſe incidents, the condition is repugnant and void in law. And it is to be obſerved, (*) that a collateral warranty or a lineal with aſſets in reſpect of the recompence, is not reſtrained by the ſtatute of *Donis conditionalibus*, no more is the common recovery in reſpect of the intended recompence. And *Littleton*, to the intent to exclude the common recovery, ſaith, *tiel alienation et diſcontinuance*, joyning them together. Vid. lib. 6. 40, 41. Sir Arch. Mildmaie's caſe. (1 Rep. 84. 1 Roll. Abr. 418.) (1 Roll. Abr. 412. 418. 10 Rep. 35. b.) 22 E. 3. 9. 17 El. 343. Dyer. (*) 13 H. 7. 24. b.

[224. a.]

If a man before the ſtatute of *Donis conditionalibus* had made a gift to a man and to the heirs of his body, upon condition, that after

‖ *cap.* 1. added in L. and M.

(1) [See Note 132.]

[224. a.]

(1) [See Note 133.]

after iſſue he ſhould not have power to ſell, this condition ſhould have bin repugnant and void (a). *Pari ratione*, after the ſtatute a man makes a gift in taile, the law *tacitè* gives him power to ſuffer a common recovery; therefore to add a condition, that he ſhal have no power to ſuffer a common recoverie, is repugnant and voyd.

If a man make a feoffment to a baron and feme in fee, upon condition, that they ſhall not alien, to ſome intent this is good, and to ſome intent it is void: for to reſtrain an alienation by feoffment, or alienation by deed, it is good, becauſe ſuch an alienation is tortious and voidable: but to reſtraine their alienation by fine is repugnant and void, becauſe it is lawfull and unavoidable.

10 H. 7. 11. 13 H. 7. 23. Lib. 6. 41. b. in Sir Anthony Mildemaye's caſe, ubi ſupra. (Hob. 261. 1. Roll. Abr. 421.)

It is ſaid, that if a man infeoffe an infant in fee, upon condition that hee ſhall not alien, this is good to reſtraine alienations during his minoritie, but not after his full age.

Doctor & Student, 124.

It is likewiſe ſaid, that a man by licence may give land to a biſhop and his ſucceſſors, or to an abbot and his ſucceſſors, and add a condition to it, that they ſhall not without the conſent of their chapiter or covent, alien, becauſe it was intended a mortmain, that is, that it ſhould for ever continue in that fee or houſe, for that they had it *en auter droit*, for religious and good uſes.

10 H. 7. 11. Doct. & Stud. 124. 13 H. 7. 23.

" *Le ſtatute de W. 2. cap. 1.*" Hereby it appeareth, that whatſoever is prohibited by the intent of any act of parliament, may be prohibited by condition, as hath beene ſaid.

Sect. 363.

*CAR il eſt prove per les parols compriſes en meſme l'eſtatute, *que la volunt del donor en tiels caſes ſerroit obſerve, et quant le tenant en le taile fait † tiel diſcontinuance, il fait le contrarie a ceo, &c. Et auxy en eſtates en le taile d'uſcun tenements, quant le reverſion de fee ſimple, ‡ou remainder en fee ſimple eſt en auters perſons, quant tiel diſcontinuance eſt fait, donques le fee ſimple ‖ en le remainder eſt diſcontinue. Et pur § ceo que le tenant en taile ne ſerra tiel choſe encounter le profit ¶ de ſes iſſues, & bone droit, tiel condition eſt bone, come eſt avauntdit, ‡ &c.*

FOR it is proved by the words compriſed in the ſame ſtatute, that the will of the donor in ſuch caſes ſhall be obſerved, and when the tenant in taile maketh ſuch diſcontinuance, hee doth contrary to that, &c. And alſo in eſtates in taile of any tenements, when the reverſion of the fee ſimple, or the remainder of the fee ſimple is in other perſons, when ſuch diſcontinuance is made, then the fee ſimple in the remainder is diſcontinued. And becauſe tenant in taile ſhall doe no ſuch thing againſt the profits of his iſſues, and good right, ſuch condition is good, as is aforeſaid, &c.

" *QUANT*

* *que fuit al entent de le feſance de meſme l'eſtatute*, added in L. and M. and Roh.

† *tiel—un*, L. and M. and Roh.

‡ *ou remainder en fee ſimple*, not in L. and M. and Roh.

‖ *en la reverſion ou le fee ſimple*, added in L. and M. and Roh.

§ *ceo—ouſter* in L. and M. and Roh.

¶ *de ſes iſſues*, not in L. and M. nor Roh.

‡ *&c.* not in L. and M. nor Roh.

(a) [See Note 134.]

"*QUANT le reverſion ou rem' on fee eſt en auters perſons.*" Put the caſe that a man make a gift in taile to *A.* the remainder to him and to his heires, upon condition that he ſhall not alien; as to the ſtate taile the condition is good, for ſuch alienation is prohibited, as hath been ſaid, by the ſaid ſtatute. But as to the fee ſimple, ſome ſay it is repugnant and voyd, for the reaſon that *Littleton* hath yeelded: and therefore ſome are of opinion, that this is a good condition, and ſhall defeat the alienation for the eſtate taile onely, and leave the fee ſimple in the alienee, for that the condition did in law extend onely to the ſtate taile, and not to the remainder.

(Poſt. 298. 333. 338.) (1 Roll. Abr. 407. 472. 474. Cro. Eliz. 360.) 11 H. 7. 6. 13 H. 7. 23, 24. Dyer 2 & 3. Phil. & Ma. 127. b.

[224. b.] "*Encounter le profit de ſes iſſues.*" Hereby it appeareth, that to reſtrain tenant in taile from alienation againſt the profit of his iſſues, is good, for that agreeth with the will of the donor, and the intent of the ſtatute*.

But a gift in taile may be made upon condition, that tenant in taile, &c. may alien for the profit of his iſſues, and that hath been holden to be good, and not reſtrained by the ſaid ſtatute, and ſeemeth to agree with the reaſon of *Littleton*, becauſe in that caſe, *Voluntas donatoris obſervetur, &c.* and it muſt be for the profit of the iſſues.

* 46 E. 3. 4. (1 Roll. Abr. 418.)

Sect. 364.

ITEM home poit doner terres en taile ſur tiel condition, que ſi le tenant en le taile ou ſes heires alienont en fee ou en taile, ou pur terme d'auter vie, &c. et auxy que ſi touts l'iſſues veignants del tenant en le taile ſoient morts ſans iſſue, que adonques bien lirroit al donor et a ſes heires de entrer, &c. Et per tiel voy le droit ‖ de le taile poet eſtre ſalve apres ¶ diſcontinuance, al iſſue en le taile, ſi aſcun + y ſoit; iſſint que per voy d'entre del donor ou de ſes heires, le taile nè ſerra my defeat per tiel condition: + Quære hoc. *Et uncore ſi le tenant en le taile en ceo caſe, ou ſes heires, font aſcun diſcontinuance, celuy en le reverſion ou ſes heires, apres ceo que le taile eſt determine pur default de iſſue, &c. poyent entrer en le terre per force de meſme le condition, et ne ſerront my § cohert de ſuer briefe de formdon en le reverter.*

ALSO a man may give lands in taile upon ſuch condition, that if the tenant in taile or his heires alien in fee or in taile, or for terme of another man's life, &c. and alſo that if all the iſſue comming of the tenant in taile be dead without iſſue, that then it ſhall be lawfull for the donor and for his heires to enter, &c. And by this way the right of the taile may be ſaved after diſcontinuance, to the iſſue in taile, if there bee any; ſo as by way of entry of the donor or of his heires, the taile ſhall not be defeated by ſuch condition: *Quære hoc.* And yet if the tenant in taile in this caſe, or his heirs, make any diſcontinuance, he in the reverſion or his heires, after that the taile is determined for default of iſſue, &c. may enter into the land by force of the ſame condition, and ſhall not be compelled to ſue a writ of formedon in the reverter.

"*ALIENONT,*

‖ *de—en* in L. and M. and Roh.
¶ *tiel* added in L. and M. and Roh.
+ *iſſue* added in L. and M. and Roh.
+ *Quære hoc*, not in L. and M. nor Roh.
§ *cohert—arte* in L. and M. and Roh.

21 H. 7. 11. (1 Rep. 16. 84.)

"*ALIENONT, &c. et auxy ſi touts les iſſues ſoient morts, &c.*" Note, *Littleton* purpoſely made parcell of the condition in the copulative, that the tenant in taile ſhould alien, &c. For if a gift in taile be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heires (Dyer 343. b.) ſhall re-enter, this is a voyd condition; for when the iſſues faile, the eſtate determineth by the expreſſe limitation, and conſequently the adding of the condition to defeate that which is determined by the limitation of the eſtate, is void, (1) and in that caſe the wife of the donee ſhall be endowed, &c. And therefore *Littleton*, to make the condition good, added an alienation, which amounted to a wrong, and hee reſtrained not the alienation onely, (for then preſently upon the alienation the donor, &c. might re-enter and defeat the eſtate taile) but added, and die without iſſue, to the end that the right of the eſtate in taile might be preſerved, [225. a.] and not defeated by the condition, but might be recovered againe by the iſſue in tayle in a *formedon*.

(Mo. 39.) And *Littleton* expreſſely ſaith, that the donor and his heirs after the diſcontinuance, and after that the eſtate tayle is determined, may re-enter, which is the intention and true meaning of *Littleton* in this place. And where it is ſaid in this ſection *(quere hoc)*, this is added by ſome that underſtood not this caſe, and is not in the originall.

(Sid. 457. 8 Rep. 85. b.) [*a*] Bracton lib. 2 fo. 19. Vide Pl. Com. 76. in Wimbeſhe's caſe & fol. 107. in Fulmerſton's caſe. Bracton ubi ſupra. (4 Rep. 52. b.) So it was adjudged in Communi Banco, Paſch. 30 Eliz. inter Baldwyn & Cooke, commonly called Trupennie's caſe. (5 Rep. 112.) [*b*] Hill. 35 Eliz. en treſpaſſe per le Seignior Mordant versGeorge Vaux ſo adjudged in the King's Bench.

Note, that in a condition conſiſting of divers parts in the conjunctive, as here in the caſe of *Littleton*, both parts muſt be performed, according to the old rule, [*a*] *Si plures conditiones aſcriptæ fuerint donationi conjunctim, omnibus eſt parendum et ad veritatem copulativè requiritur quòd utraque pars ſit vera.* But otherwiſe it is when the condition is in the disjunctive, (1) for the ſame author in that caſe ſaith, *Si diviſim enilibet, vel alteri eorum ſatis eſt obtemperare. Et in disjunctivis ſufficit alteram partem eſſe veram.* What then if the condition or limitation be both in the conjunctive and disjunctive: As if a man make a leaſe to the huſband and wife, for the tearme of one and twenty yeares, if the huſband and wife or any child betweene them ſo long ſhall live, and then the wife dyeth without iſſue; ſhall the leaſe determine, or continue during the life of the huſband? And the anſwer is, that it ſhall continue, for the disjunctive referreth to the whole, and disjoyneth not only the latter part, as to the child, but alſo to the baron and fem, ſo as the ſenſe is, if the baron, fem, or any child ſhall ſo long live.

[*b*] And ſo it is if an uſe be limited to certaine perſons, untill *A.* ſhall come from beyond ſea, and attain unto his full age, or dye, if he doth come from beyond ſea, or attaine to his full age, the uſe doth ceaſe.

(1) See Boraſton's caſe, 3 Rep. 19. Webb v. Herring, Cro. Ja. 416. King v. Rumball, Cro. Ja. 448. Chadock v. Cowley, ibid. 693. Forteſcue v. Abbott, Poll. 479. and Sir Thomas Jones, 793 and Goodtitle v. Whitby, 1 Burr. 228. See alſo 1 P. W. 170;—and Mr. Fearne's Eſſay on Contingent Remainders, p. 167.

[225. a.]

(1) [See Note 135.]

Sect. 365.

ITEM, home ne poit pleder en aſcun action, que eſtate fuit fait en fee, ou en fee taile, ou pur terme de vie, ſur condition, † s'il ne voucha un record de ceo, ou monſtra un eſcript ſouth ſeale, provant meſme la condition. Car il eſt un common eruditione, que home per plee ne defeatera aſcun eſtate de franktenement per force d'aſcun tiel condition, ſinon que il monſtra le proofe de condition en eſcript, &c. ſinon que ceo ſoit en aſcuns eſpeciall caſes, &c. Mes de chattels reals, ſicome de leas fait a terme d'ans, ou de grants de gards fait per gardeins in chivalrie, & hujuſmodi, &c. home poit pleder que tiels leaſes ou grants ſueront faits ſur condition, &c. ſans monſtre aſcun eſcript de le condition. Iſſint en meſme le manner home poit faire de donea. & grants de chattels perſonals, & de contracts perſonals, &c.

ALSO a man cannot plead in any action, that an eſtate was made in fee, or in fee tayle, or for terme of life, upon condition, if he doth not vouch a record of this, or ſhew a writing under ſeale, proving the ſame condition. For it is a common learning, that a man by plea ſhal not defeat any eſtate of freehold by force of any ſuch condition, unleſſe he ſheweth the proofe of the condition in writing, &c. unleſſe it bee in ſome ſpeciall caſes, &c. But of chattels reals, as of a leaſe for yeares, or of grants of wards made by gardians in chivalrie, and ſuch like, &c. a man may plead that ſuch leaſes or grants were made upon condition, &c. without ſhewing any writing of the condition. So in the ſame manner a man may doe of gifts and grants of chattels perſonals, and of contracts perſonals, &c.

"*EN aſcun action.*" Bee the action reall, perſonall, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true, that a deed muſt bee ſhewed forth [a] in court (2). And the reaſon why the deed ſhall bee ſhewed forth to the court is, for that to every deed there be two things requiſite: the one, that it be ſufficient in law, and this is called the legall part, and therefore the judgment of that belongeth to the judges of the law: the other concernes matter of fact, as ſealing and delivery, and this belongs to the jurors. And becauſe every deed ought to approve itſelfe, and be proved by others too; it muſt approve it ſelfe upon the ſhewing of it forth in court in two manners. 39 E. 3. 22. 4 E. 4. 35. a. 9 E. 4. 25. b. 26. a. 6 H. 7. 8. b. 11 H. 7. 22. b. 7 H. 6. 7. 14 H. 8. 22. b. 28 Aſſ. p. 1. (1 Sid. 50.) [a] Lib. 10. fo. 92. Doctor Layfield's caſe. 7 E. 3. 57. 25 E. 3. 41. 41 E. 3. 10. acc. (Ant. 6. a.) (10 Rep. 92.)

[225. b.] First, as to the compoſition of the words, that it bee ſufficient in law, and that the court ſhall adjudge.

Secondly, of ancient time if the deed appeared to bee raſed or interlined in places materiall, the judges adjudged upon their view, the deed to be voyd (1). But of latter time the judges have left that to the jurors to try whether the raſing or interlining were before the deliverie. (11 Rep. 26. b. Dyer 261. b. 1 Roll. Abr. 208. Cro. Car. 399. Doct. Pla. 260.)

And (Poſt. 227. 2 Cro. 217.)

† *que* added in L. and M. and Roh.

(2) See 2 Bulſt. 259. 160. 6 Mod. 237. 2 Salk. 498. (1) [See Note 136.]

(45 E. 3. 21. a. Poſt. 306. b. 338. a. ſect. 214.)

And there is a difference betweene a rent, and a re-entry; for upon a gift in taile, or a leaſe for life, a rent may be reſerved without deed, but a condition with a re-entrie cannot bee reſerved in thoſe caſes without deed.

Lib. 5. fol. 52, 53, &c. Page's caſe. 6 Rep. 2. cap. 4. (5 Rep. 74. 76. 10 Rep. 92.)

"*Eſcript ſouth ſeale.*" Which *Littleton* intendeth to bee a deed under ſeale.

[b] Vide 32 H. 8. in Patents Br. 12 H. 7. 12. b.

And well ſaid *Littleton*, a *deed under ſeale*. For though the deed be inrolled, yet hee cannot plead the inrolment thereof, though it be of record. And though it be exemplified under the great ſeale, [b] yet muſt he ſhew forth the deed it ſelfe under ſeale, as *Littleton* here ſaith, and not the exemplification (2). And ſo when *Littleton* wrote, no *conſtat*, or *inſpeximus*, of the king's letters patents were availeable to be ſhewed forth in court, but the letters patents themſelves under ſeale. For both the *conſtat* and *inſpeximus* are but exemplifications of the inrolment of the charters, or letters patents: and this appeareth by the reſolution of two ſeverall [c] parliaments, one holden in the third and fourth yeare of king *Edward* the ſixt, and the other in the thirteenth years of queene *Elizabeth*. But now by thoſe ſtatutes the exemplification or *conſtat* under the great ſeale of the inrolment of any letters patents made ſince the fourth day of February *anno* 27 *H.* 8, or after to be made, ſhal be ſufficient to be pleaded and ſhewed forth in court, aſwel againſt the king, as any other perſon by the patentees themſelves (whereof there was ſome doubt [d] conceived upon the ſaid ſtatute of *E.* 6.) and by all and every other perſon and perſons clayming by, from, or under them. Which ſtatutes are general and beneficiall, and eſpecially the act of 13 *Eliz.* for that extends not only to lands, tenements, and hereditaments, but to every other thing whatſoever, and ought to be favourably conſtrued for advancement of the remedie and right of the ſubject (3).

(2 Inſt. 672. 5 Rep. 52, 53.)

[c] 3 & 4 E. 6. cap. 4. and 13 Eliz. cap. 6.

[d] Dyer 1 Eliz. 167. (Hard. 118.)

(2 Sid. 145.) (1 Mod. 117.)

The difference betweene a *conſtat*, *inſpeximus*, and a *vidimus*, you may reade [e] at large in *Page*'s caſe. But none of them by law ought to be had, but only of the inrolment of record, and not of a deed or any other writing that is not of record, and no deed, &c. can be inrolled, unleſſe it be duely and lawfully acknowledged.

[e] Lib. 8. fol. 8. in the Prince's caſe. Vide Page's caſe ubi ſupra.

33 E. 3. gard. 162. 20 H. 3. darrein preſent. 13. 35 H. 6. tit. monſtrans des faits 118.

"*Si non que ſoit en aſcun eſpeciall caſes, &c.*" Hereby is implyed, that if a gardian in chivalrie in the right of the heire entreth for a condition broken, hee ſhall plead the ſtate upon condition without ſhewing of any deed, becauſe his intereſt is created by the law. And ſo it is [f] of a tenant by ſtatute merchant or ſtaple, or tenant by *elegit*.

[f] 20 H. 7. 5. (5 Rep. 75. a.) (2 Cro. 217.) (10 Rep. 93, 94.) 35 H. 6. tit. monſtrans des faits 11. b. 7 H. 6. 17 H. 5. 5. 3 H. 6. 21. 33 H. 6. 1. 14 H. 8. 8.

Likewiſe tenant in dower ſhall plead a condition, &c. without ſhewing of the deed. And the reaſon of theſe and the like caſes, is, for that the law doth create theſe eſtates, and they come not in by him that entred for the condition broken, ſo as they might provide for the ſhewing of the deed, but they come to the land by authoritie of law, and therefore the law will allow them to plead the condition without ſhewing of it.

[f] But the lord by eſcheat, albeit his eſtate be created by law, ſhall not plead a condition to defeat a freehold without ſhewing of it, becauſe the deed doth belong unto him. [226. a.]

A tenant

(2) On giving deeds of bargain and ſale in evidence, ſee Bull. Ni. Pri. 255; 10 Ann. c. 18.; and 8 G. 2. c. 6. ſec. 21.

(3) See alſo 27 Eliz. 9. and Bull. Ni. Pri. 226.

A tenant by the curteſie ſhall not [g] plead a condition made by his wife, and a re-entry for the condition broken without ſhewing the deed; for albeit his eſtate be created by law, yet the law preſumeth that he had the poſſeſſion of the deedes and evidences belonging to his wife. [g] 35 H. 6. ubi ſupra.

[h] But leſſees for yeares, and all others that claime by any conveyance from the party, or juſtifie as ſervant by commandement, &c. muſt ſhew the deed. [h] 14 H. 8. 8. Pl. Com. 149. (10Rep. 92,93.)

[i] *R.* brought an *ejectione firmæ* againſt *E.* for ejecting him out of the mannor of *D.* which he held for terme of yeares of the demiſe of *C.* *E.* the defendant pleaded that *B.* gave the ſaid mannor to *P.* and *Katherine* his wife in taile, who had iſſue *E.* the defendant, and after the donees infeoffed *C.* of the mannor, upon condition that he ſhould demiſe the mannor for yeares to *R.* the plaintife, the remainder to the huſband and to the wife, &c. *C.* did demiſe the land to *R.* the plaintife for yeares, but kept the reverſion to himſelfe, wherefore *Katherine* after the deceaſe of her huſband entred upon the plaintife, &c. for the condition broken, and died; after whoſe deceaſe the land deſcended to *E.* the iſſue in taile, &c. now defendant, judgement upon action, exception was taken againſt this plea, becauſe *E.* the defendant maintained his entry by force of a condition broken, and ſhewed forth no deed, and the plea was ruled to be good, becauſe the thing was executed, and therefore hee need not ſhew forth the deed. *Nota*, the defendant being iſſue in taile was remitted to the eſtate taile. (1) [i] 44 E. 3. 22. (6 Rep. 38.) (Cro. Car. 442.) See after this chapter, ſect. 366. 7 Rep. Ughtred's caſe.

In a *præcipe quòd reddat* againſt *S.* who pleaded that *R.* was ſeiſed, and infeoffed him in morgage upon condition of payment of certaine money at a day, and ſaid that *R.* paid the money at the day, and entred judgement of the writ: exception was taken to this plea, for that he ſhewed forth no deed of the condition, and it was ruled that hee need not ſhew forth the deed for two cauſes. 1. That he ought not to ſhew any deed to the demandant, becauſe the demandant is a ſtranger. 2. It might be when *R.* paid the money, and the condition performed, that the deed was bailed to *R.* and thereupon the plea was adjudged good, and the writ abated. 11 Ed. 3. tit. Monſtrans des faits. 175. 45 E. 3. 8. (Cro. Car. 372.)

If land be morgaged upon condition, and the morgagee letteth the lands for yeares, reſerving a rent, the condition is performed, the morgagor re-enters, in an action of debt brought for the rent the leſſee ſhall plead the condition and the re-entry without ſhewing forth any deed. 45 E. 3. 8. b. Finch.

In an aſſiſe the tenant pleads a feoffment of the anceſter of the plaintife unto him, &c. the plaintife ſaith that the feoffment was upon condition, &c. and that the condition was broken, and pleades a re-entry, and that the tenant entred and tooke away the cheſt in which the deed was, and yet detaineth the ſame, the plaintife ſhall not in this caſe be enforced to ſhew the deed. 10 H. 4. 9. b. 43 E. 3. Vide 10 E. 3. 41. Simile in dower.

If a woman give lands to a man and his heires by deed or without generally, ſhe may in pleading averre the ſame to be *cauſâ matrimonii prælocuti*, albeit ſhe hath nothing in writing to prove the ſame, the reaſon whereof ſee *Sect.* 330. 12 E. 1. Feoffments & Faits 114. F. N. B. 105. b. 13 R. 2. Monſtrans des faits 165.

"*Mes des chattels realls, ſicome leaſe fait a volunt a terme des ans, &c.*" This is apparant. 4 E. 4 35, &c. 11 H. 7. 22. b. 6 H. 7. 8.

9 E. 4. 25, 26. 14 H. 8. 22. b. (Doc. Pla. 51.) (See Plo. 23. a.) (1 Roll. Abr. 413.)

(1) [See Note 137.]

Sect. 366.

ITEM, coment que home en aſcun action ne poit pleder un condition que toucha & concerna franktenement, ſauns monſtrer eſcript de ceo, come eſt avantdit, uncore home poit eſtre aide ſur tiel condition per verdict de xii. homes priſe a large en aſſiſe de novel diſſeiſin, *ou en aſcun auter action, l'ou les juſtices voilent prender* * *le verdict de xii. jurors a large. Sicome mittomus, que home ſeiſie de certaine terre en fee leſſa meſme la terre a un auter pur terme de vie ſans fait, ſur condition de render al leſſor un certaine rent, & pur default de paiment un re-entrie, &c. per force de quel le leſſee eſt ſeiſie come de franktenement, et puis le rent eſt aderere, per que le leſſor enter en la terre, et puis le leſſee arraigne un* aſſiſe de novel diſſeiſin *de la terre envers le leſſor, le quel plead que il fiſt nul tort ne nul diſſeiſin, et ſur ceo l'aſſiſe ſoit priſe; en ceſt caſe les recognitors de l'aſſiſe poyent dire et render a les juſtices lour verdict a large ſur tout le matter, come a dire, que le defendant fuit ſeiſie de la terre en ſon demeſne come de fee, et iſſint ſeiſie, meſme la terre leſſe al plaintife pur terme de ſa vie, rendant al leſſour tiel annuel rent paiable a tiel feaſt, &c. ſur tiel condition, que ſi le rent fuit aderere a aſcun tiel feaſt † a que doit eſtre pay, donques bien lirroit al leſſor d'entrer, &c. per force de quel leaſe le plaintife fuit ſeiſie en ſon demeſne come de franktenement, et que puis apres le rent fuit aderere a tiel feaſt, ‡ &c. per que le leſſor entra en le terre ſur le poſſeſſion le leſſee, et prieroit le diſcretion de les juſtices, ſi ceo ſoit un diſſeiſin fait al plaintife ou nemy; ‖ donque per ceo que appiert a les juſtices, que ceo ſuit nul diſſeiſin fait al plaintife,*

ALSO, albeit a man cannot in any action pleade a condition which toucheth, & concernes a freehold, without ſhewing writing of this, as is aforeſaid, yet a man may be aided upon ſuch a condition by the verdict of 12 men taken at large in an aſſiſe of *novel diſſeiſin*, or in any other action where the juſtices will take the verdict of 12 jurors at large. As put the caſe, a man ſeiſed of certaine land in fee letteth the ſame land to another for terme of life without deed, upon condition to render to the leſſor a certaine rent, and for default of payment a re-entrie, &c. by force whereof the leſſee is ſeiſed as of freehold, and after the rent is behinde, by which the leſſor entereth into the land, and after the leſſee arraine an aſſiſe of *novel diſſeiſin* of the land againſt the leſſor, who pleads that he did no wrong nor diſſeiſin, and upon this the aſſiſe is taken; in this caſe the recognitors of the aſſiſe may ſay and render to the juſtices their verdict at large upon the whole matter, as to ſay, that the defendant was ſeiſed of the land in his demeſne as of fee, and ſo ſeiſed, let the ſame land to the plaintife for terme of his life, rendring to the leſſor ſuch a yearely rent payable at ſuch a feaſt, &c. upon ſuch condition, that if the rent were behinde at any ſuch feaſt at which it ought to bee paid, then it ſhould bee lawfull for the leſſor to enter, &c. by force of which leaſe the plaintife was ſeiſed in his demeſne as of freehold, and that afterwards the rent was behinde at ſuch a feaſt, &c. by which the leſſor entred into the land upon the poſſeſſion of the leſſee, and prayed

the

* *le— per* in L. and M. and Roh.
† *a* not in L. and M. nor Roh.
‡ *An* added L. and M. and Roh.
‖ *Et* added in L. and M. and Roh.

plaintife, entant que l'entrie de le leſſour fuit congeable ſur luy; les juſtices doyent doner judgement que le plaintife ne prendra riens per ſon briefe d'aſſiſe. Et iſſint en tiel cas le leſſor ſerra aide, et uncore nul eſcripture unques fuit fait del condition. Car cibien que les jurors poient aver conuſance de le ‡ leaſe, auxy bien ils poient aver conuſance de le condition que fuit declare & rehearſe ſur le leas.

the diſcretion of the juſtices, if this bee a diſſeiſin done to the plaintife or not; then for that it appeareth to the juſtices, that this was no diſſeiſin to the plaintife, inſomuch as the entrie of the leſſor was congeable on him; the juſtices ought to give judgement that the plaintife ſhall not take any thing by his writ of aſſiſe. And ſo in ſuch caſe the leſſor ſhall bee aided, and yet no writing was ever made of the condition. For as well as the jurors may have conuſance of the leaſe, they alſo as well may have conuſance of the condition which was declared and rehearſed upon the leaſe.

"*VERDIT, or verdict de 12 homes.*" (2) *Veredictum, quaſi dictum veritatis, as judicium eſt quaſi juris dictum. Et ſicut ad quæſtionem juris, non reſpondent juratores ſed judices: ſic ad quæſtionem facti non reſpondent judices ſed juratores.* For jurors are to [226. b.] try the fact, and the judges ought to judge according to the law that riſeth upon the fact, for *ex facto jus oritur.*

(Poſt. 253. b. 261. b.) Lib. 8. fo. 155. Lib. 9. fo. 13. Lib. 11. fo. 10. (Plo. 93. 2 Liſt. 425. 2 Roll. Abr. 693, 694. Cro. El. 699.

698. 699, 700. 711. 717. 725. Hob. 117. 4 Rep. 65. b. 1 Sid. 27. 191. 194. 203. 9 Rep. 67. b.)

"*Priſe a large.*" There be two kindes of verdicts; viz. one generall, and another at large or eſpeciall. As in an aſſiſe of *novel diſſeiſin*, brought by *A.* againſt *B.* the plaintife makes his plaint, *Quòd B. diſſeiſivit eum de* 20 *acris terræ cum pertinentiis*; the tenant pleades, *Quòd ipſe nullam injuriam ſeu diſſeiſinam præfato A. inde fecit, &c.* The recognitors of the aſſiſe doe finde, *Quod prædict. A. injuſtè & ſine judicio diſſeiſivit prædict. B. de prædict.* 20 *acris terræ cum pertinent' &c.* This is a generall verdict. The like law it is if they finde it negatively. And *Littleton* here putteth a caſe of a verdict at large, or a ſpeciall verdict; and it is therefore called a ſpeciall verdict, or a verdict at large, becauſe they finde the ſpeciall matter at large, and leave the judgement of law thereupon to the court, of which kinde of verdict it is ſaid, [*l*] *Omnis concluſio boni & veri judicii ſequitur ex bonis & veris præmiſſis et dictis juratorum.*

(9 Rep. 12, 13.)

(Plo. 93. a.) (Poſt. 227, 228.)

[*l*] Trin. 38 E. 3. Coram Rege Nott. in Theſaur.

And though *Littleton* here puts his caſe of a verdict at large upon a generall iſſue (which is the caſe hee putts, it was neceſſary for the tenant to pleade) yet when iſſue is joyned upon ſome ſpeciall point, the jury, as ſhall be ſaid hereafter in this ſection, may finde the ſpeciall matter if it be doubtfull in law, for as much doubt may ariſe upon one point upon the ſpeciall iſſue as upon the generall iſſue.

43 Aſſ. 31. Stanf. pl. cor. 164, 165. 3 E. 3. coron. 284. 286, 287. 44 E. 3. 44.

[227. a.] And as a ſpeciall verdict may be found in Common Pleas, ſo may it alſo bee found in Pleas of the Crowne, or criminal cauſes that concerne life or member.

41 E. 3. Coron. 451. (Cro. Eliz. 474. Ib. 471. 113, 114. 653. 6 Rep. 46. b.

A verdict

‡ *leaſe, auxy bien ils poient aver conuſance de le,* not in L. and M. nor Roh.

(2) See Bacon Abr vol. 5. 281. Vin. vol. 21. 373. Com. Dig. Abatement, (I. 34.) Amendment, (P.) Appeals, (G. 14.) Eſtoppel, (E. 10.) Evidence, (A. 5.) Pleader, (C. 87. E. 38. R. 13. S. 1.) Prerogative, (D. 76.)

40 E. 3. 15. 20 E. 3. amendment, 57. 18 E. 3. 49. in Ceſſavit. 30 E. 3. 23. 7 H. 4. 39. (8 Rep. 65.) 17 E. 3. 47. 18 E. 3. 48. 22 E. 3. 1. 18 E. 3. 56. 15 E. 3. Judgement, 58. 2 H. 5. 3. 7 H. 6. 5. 7 E. 4. 24. 28 H. 6. 10. (Cro. Jac. 31. 2 Roll. Abr. 722. 10 Rep. 119. Hob. 64.

A verdict finding matter incertainely or ambiguouſly is inſufficient, and no judgement ſhall be given thereupon; as if an executor plead *plenument adminiſtre*, and iſſue is joyned thereupon, and the jury finde that the defendant have goods within his hands to be adminiſtred, but finde not to what value, this is incertaine, and therefore inſufficient.

A verdict that finds part of the iſſue, and finding nothing for the reſidue, this is inſufficient for the whole, becauſe they have not tried the whole iſſue wherewith they are charged. As if an information of intruſion bee brought againſt one for intruding into a meſuage, and 100 acres of land, upon the generall iſſue the jury finde againſt the defendant for the land, but ſaith nothing for the houſe, this is inſufficient for the whole, and ſo was it twice adjudged. [*m*] But if the jury give a verdict of the whole iſſue, and of more, &c, that which is more is ſurpluſage, and ſhall not [*a*] ſtay judgement; for *Utile per inutile non vitiatur*, but neceſſary incidents required by law the jury may finde.

6 Rep. 47. 2 Roll. Abr. 702. 706. Dyer 346. b. 300. b. Poſt. 303. a. b. Doctr. Pla. 288, 289. Hob. 54. Cro. El. 174. 2 Roll. Abr. 708. Hob. 18. 9 Rep. 67. b. 118. 4 Rep. 65. Ant. 114. b. Cro. El. 110. 10 Rep. 97. b.) [*m*] Hil. 25 Eliz. in a writ of error betweene Brace and the Queene in the Exchequer chamber, Mich. 28 & 29 Eliz. inter Gomerſal & Gomerſal in account in the King's bench. [*a*] 32 E. 3. Ceſſavit. 25. Vid. Sect. 484, 485. (Poſt. 282.) Vid. Sect. 58. 13 E. 3. garr. 26. 15 E. 3. Aſſ. 322. 17 E. 3. 6. 18 Aſſ. 2. 35 Aſſ. 8.

If the matter and ſubſtance of the iſſue bee found, it is ſufficient, as *Littleton* himſelfe ſayeth hereafter.

Eſtoppells which bind the intereſt of the land, as the taking of a leaſe of a man's owne land by deed indented, and the like, being ſpecially found by the jurie, the court ought to judge according to the ſpeciall matter; for albeit eſtoppels regularly muſt be pleaded and relied upon by an apt concluſion, and the jury is ſworne *ad veritatem dicendam*, yet when they finde *veritatem facti*, they purſue well their oath, and the court ought to adjudge according to law. [*b*] So may the jurie find a warrantie being given in evidence, though it be not pleaded, becauſe it bindeth the right, unleſſe it be in a writ of right, when the miſe is joyned upon the meere right.

[*b*] 1 H. 4. 6. b. 27 H. 8. 22. b. Pl. Com. 515. Lib. 4 fo. 53. Rawlins' caſe, & ibid. Pledol's caſe. Hil. 31 Eliz. betweene Sutton and Dicons in the Common Place, the caſe of the leaſe for yeares by deed indented. 34 E. 3. Droit. 29. (Poſt. 352. Ant. 47. b. Doc. Pla. 164. Poſt. 283. Cro. El. 141.)

[*c*] 7 R. 2. Corone 108. Plo. Com. Freman's caſe 211. 11 H. 4. 2. 20 Aſſ. 12. 16 Aſſ. 16. 22 Aſſ. 23. 5 H. 7. 22.

[*c*] After the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the firſt offer of their verdict, and that verdict which is recorded ſhall ſtand: alſo they may vary from a privy verdict. [227. b.

An iſſue found by verdict ſhall always be intended true untill it be reverſed by attaint, and thereupon upon the attaint no *ſuperſedeas* is grantable by law.

Paſch. 24 H. 8. of the report of Juſtice Spilman in the King's Bench. 11 H. 4. 17. 35 H. 6. Examin. 17. 29 H. 8. 37.

If the jurie after their evidence given unto them at the barre, doe at their owne charges eat or drinke either before or after they be agreed on their verdict, it is finable, but it ſhall not avoid the verdict: but if before they be agreed on their verdict, they eate or drinke at the charge of the plaintife, if the verdict be given for him, it ſhall avoid the verdict: but if it be given for the defendant,

Dier. (1 Vent. 125.) 35 H. 8. 55. 4 et 5 Eliz. 218. 14 H. 7. 1. 20 H. 7. 3.

if

it ſhall not avoid it, *& ſic è converſo.* [d] But if after they be agreed on their verdict they eat or drinke at the charge of him for whom they doe paſſe, it ſhall not avoid the verdict.

[d] Paſch. 6 E. 6. in the Common Place.

[e] If the plaintife after evidence given, and the jury departed from the barre, or any for him, doe deliver any letter from the plaintife to any of the jury concerning the matter in iſſue, or any evidence, or any eſcrowle-touching the matter in iſſue, which was not given in evidence, it ſhall avoid the verdict, if it be found for the plaintife, but not if it be found for the defendant, *& ſic è converſo.* But if the jury carry away any writing unſealed, which was given in evidence in open court, this ſhall not avoid their verdict, albeit they ſhould not have carryed it with them.

[e] 11 H. 4. 16, 17. 3 Mar. Jurors Br. 8. Vide Dier ubi ſupra. (2 Roll. Abr. 713. 814. 1 Leo. 18. Cro. Jac. 121. Sid. 225.)

By the law of England a jury, after their evidence given upon the iſſue, ought to be kept together in ſome convenient place, without meat or drinke, fire or candle, which ſome bookes [f] call an impriſonment, and without ſpeech with any, unleſſe it be the bailife, and with him onely if they be agreed. After they be agreed they may in cauſes between party and party give a verdict, and if the court be riſen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court ſhall ſtand. But in criminall caſes of life or member, the jury can give no privy verdict, but they muſt give it openly in court. And hereby appeareth another diviſion of verdicts, *viz.* a publique verdict openly given in court, and a privy verdict given out of the court before any of the judges, as is aforeſaid.

Paſch. 6 E. 6. ubi ſupra. (Mo. 452. 2 Roll. Abr. 714, 715, 716.)

[f] 24 E. 3. 75. (1 Cro. Jac. 141. 616.)

A jury ſworne and charged in caſe of life or member, cannot be diſcharged by the court or any other, but they ought to give a verdict. And the king cannot be non-ſuit, for he is in judgement of law ever preſent in court: but a common perſon may be non-ſuit.

21 E. 3. 18. (Ant. 139. b. 9 Rep. 13.)

"*En aſſiſe de novel diſſeiſin, ou en aſcun auter action, &c.*" Here it is to bee obſerved, that a ſpeciall verdict, or at large, may be given in any action, and upon any iſſue, be the iſſue generall or ſpeciall: and albeit there be ſome contrary opinions in our bookes, yet the law is now ſettled in this point.

W. 2. cap. 30. 7 H. 4. 11. 8 E. 4. 29. 9 H. 7. 13. 23 H. 8. tit. verdit. Br. 85. 11 Eliz. Dier. 283, 284. 3 E. 3. Itinere North. 284. 286. 43 Aſſ. 31. 26 H. 8. 5. 44 E. 3. 44. F. tit. Coron. 94. 44 Aſſ. 17. 45 E. 3. 20. Pl. Com. 92. 9 H. 7. 3. Vide lib. 9. 12, 13 Dowman's caſe. And ſee there many other authorities. 31 Aſſ. pl. 21. 10 H. 4. 9.

"*Per que le leſſor entra.*" Here it appeareth that the condition is executed by re-entry, and yet the leſſor after his re-entry ſhall not, by the opinion of *Littleton*, plead the condition without ſhewing the deed, becauſe he was partie and privie to the condition, for the parties muſt ſhew forth the deed, unleſſe it be by the act and wrong of his adverſary, as hath beene ſaid; [m] but an eſtranger which is not privie to the condition, nor claimeth under the ſame, as in the caſes aboveſaid appeareth, ſhall not after the condition is executed in pleading be inforced to ſhew forth the deed: and by this diverſitie all the bookes and authorities in law which ſeeme to be at variance are reconciled. See alſo for this matter the ſection next following.

[m] See more before in this chapter, ſect. 365. (Sid. 369. 6 Rep. 38.)

"*Les recognitors del aſſiſe poient dire, &c.*" Here it appeareth that the jurors may finde the fact, albeit the deed be not ſhewed in evidence,

10 Aſſ. p. 9. 21 Aſſ. 28. 17 Aſſ. 20. 31 Aſſ. 21.

23 Aſſ 2. 39 E. 3. 28. 44 E. 3. 23. 10 H. 4 9. 7 H. 5. 5. 9 E. 4. 26. 18 E. 4. 12. 15 E. 4. 16, 17. 11 H. 7. 22. (Ant. 225. Cro. Jac. 336.)

evidence, and the rather for that the condition upon the livery (as hath beene ſaid) is good, albeit there be no deed at all.

" *Et prieront le diſcretion des juſtices.*" That is to ſay, they (having declared the ſpeciall matter) pray the diſcretion of the juſtices; which is as much to ſay, as, that they would diſcerne what the law adjudgeth thereupon, whether for the demandant, or for the tenant; for as by the authoritie of *Littleton, diſcretio eſt diſcernere per legem, quid ſit juſtum*, that is, to diſcerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call diſcretion: *Si à jure diſcedas, vagus eris, & erunt omnia omnibus incerta:* and therefore commiſſions that authoriſe any to proceed, *ſecundum ſanas diſcretiones veſtras*, is as much to ſay, as, *ſecundum legem & conſuetudinem Angliæ.*

Lib. 10. fo. 4. caſe de Sewers.

" *Car cibien come les jurors poient aver conuſance, &c.*" Hereby it appeareth that they that have conuſance of any thing, are to have conuſance alſo of all incidents and dependants thereupon, for an incident is a thing neceſſarily depending upon another.

If a deed be made and dated in a forraine kingdome, of lands within England, yet if liverie and ſeiſin be made, *ſecundum formam cartæ*, the land ſhall paſſe, for it paſſeth by the liverie. [228. a.]

1 E. 3 17. in Gracye's caſe.

Sect. 367.

*EN meſme le manner eſt de feoffement en fee, ou done en le taile, ſur condition, coment que nul eſcripture unque fuet fait de ceo *. Et ſicome eſt dit de verdict a large en aſſiſe, &c. en meſme le manner eſt en brieſe d'entre foundue ſur diſſeiſin; et en touts autres actions ou les juſtices voylent prender le verdict à large, y † la ou tiel verdict a large eſt fait, la manner del entrie entire eſt mis en l'iſſue, &c.*

IN the ſame manner it is of a feoffement in fee, or a gift in taile, upon condition, although no writing were ever made of it. And as it is ſayd of a verdict at large in an aſſiſe, &c. in the ſame manner it is of a writ of entrie founded upon a diſſeiſin; and in all other actions where the juſtices will take the verdict at large, there where ſuch verdict at large is made, the manner of the whole entrie is put in the iſſue, &c.

AND it is to be obſerved, that the court cannot refuſe a ſpeciall verdict, if it bee pertinent to the matter put in iſſue. See the ſection next preceding.

(9 Rep. 13.) See the ſection next following. (10 Rep. 118. Ant. 226.)

" *Verdict a large.*" It is called a verdict at large becauſe it findeth the matter at large, and leaves it to the judgement of the court: or it is called a ſpecial verdict, becauſe it findeth the ſpeciall matter, &c. So as hereby it appeareth, that a verdict (as hath beene ſaid) is two fold, viz. a verdict at large, or a ſpeciall verdict,

* &c L. and M. and Roh.

† *par la ou tiel verdict a large fait la nature de matter mys en l'iſſue*, L. and M. and Roh.

verdict, (which is all one) whereof *Littleton* here ſpeaketh; and a generall verdict that is generally found according to the iſſue, as if the iſſue be not guilty, to finde the partie guiltie or not guiltie generally, *& ſic de cæteris.* There is alſo a verdict given in open court, and a privy verdict given out of court before any of the judges of the court, ſo called becauſe it ought to bee kept ſecret and privie from each of the parties, before it be affirmed in court. See the next preceding ſection.

Sect. 368.

ITEM en tiel caſe l'ou l'enqueſt poit dire lour verdict a large, s'ils voilent prendre ſur eux le conuſance de la ley ſur le matter, ils poient dire lour verdict generalment, come eſt mis en lour charge; come en le caſe avantdit ils poient bien dire, que le leſſor ne diſſeiſa pas le leſſee, s'ils voilent, &c.

ALSO in ſuch caſe where the enqueſt may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the caſe aforeſaid they may well ſay, that the leſſor did not diſſeiſe the leſſee, if they will, &c.

ALTHOUGH the jurie if they will take upon them (as *Littleton* here ſaith) the knowledge of the law, may give a generall verdict, yet it is dangerous for them ſo to doe, for if they doe miſtake the law, they runne into the danger of an attaint; therefore to find the ſpeciall matter is the ſafeſt way where the caſe is doubtfull. (8 Rep. 65.) (4 Rep. 53.)

[228. b.] Sect. 369.

*ITEM en meſme le caſe, ſi le caſe fait tiel, que apres ceo, que le leſſor avoit enter pur default de payment, &c. que le leſſe uſt enter ſur le leſſor, et luy diſſeiſiſt, en ceſt caſe ſi le leſſor arraigne un aſſiſe envers le leſſee, le leſſee luy puit barre de l'aſſiſe; car il poit pleader envers luy en bar, coment le leſſor que eſt plaintife fiſt un leaſe al defendant pur terme de ſa vie, ſavant le reverſion al plaintife, quel eſt bone plea en barre, entant que il conuſt le reverſion eſtre al plaintife. * En ceſt caſe le plaintife n'ad † aſcun matter de luy ayder, forſque le condition fait ſur le leas, et ceo il ne poet pleader, pur ceo que il n'ad aſcun eſcripture de ceo.*

ALSO in the ſame caſe, if the caſe were ſuch, that after that, that the leſſor had entred for default of payment, &c. that the leſſee had entered upon the leſſor, and him diſſeiſed, in this caſe if the leſſor arraigne an aſſiſe againſt the leſſee, the leſſee may barre him of the aſſiſe; for hee may pleade againſt him in bar, how the leſſor who is pl. made a leaſe to the defen. for term of his life, ſaving the reverſion to the pl. which is a good plea in bar, inſomuch as hee acknowledges the reverſion to be to the pl. In this caſe the plaintif hath no matter to ayd himſelfe, but the condition made upon the leaſe, & this

* *Et* added in L. and M. and Roh. † *aſcun* not in L. and M. nor Roh.

ceo: et entant que il ne poet reſponder al barre, il ſera a barre. Et iſſint en ceſt caſa poyes veier que home eſt ‡ diſſeiſie, et uncore il n'avera aſſiſe. Et uncore ſi le leſſee ſoit plaintife, et le leſſor defendant, il barrera le leſſee per verdict d'aſſiſe, &c. Mes en ceſt caſe l'ou le leſſee eſt defendant, ſi il ne voile plead le dit plea en barre, mes plead nul tort, nul diſſeiſin, donques le leſſor recovera per aſſiſe, cauſâ quâ ſuprà.

this he cannot plead, becauſe he hath not any writing of this: and inaſmuch as he cannot anſwere the bar, he ſhal be barred. And ſo in this caſe you may ſee that a man is diſſeiſed, & yet he ſhal not have aſſiſe. And yet if the leſſee be pl. and the leſſor def. he ſhall bar the leſſee by verdict of the aſſiſe, &c. But in this caſe where the leſſee is def. if he will not plead the ſaid plea in bar, but plead *nul tort, nul diſſ.* then the leſſor ſhal recover by aſſiſe, *cauſâ quâ ſuprà.*

"PUR ceo que il n'ad aſcun eſcripture de ceo." Hereby it alſo appeareth, that albeit the condition was executed by reentrie, yet the leſſor cannot plead it without ſhewing of a deed. But of this matter ſufficient hath beene ſaid before in the two next preceding ſections.

18 E. 4. 10.
12 Aſſ. 38.
10 Aſſ. 16.
26 H. 6. Bar. 9.
38 Aſſ. 26. 4.
31 Aſſ. 26.
39 Aſſ. 3.
43 Aſſ. 18.
41 Aſſ. 3.
18 E. 3. Aſſ. 77.
31 E. 3. ibid. 97. 18 Aſſ. 22.
4 Eliz. Dyer 207.
8 Eliz. Dyer 246. (Ant. 201. a.)

"*Quel eſt bone plea en barre.*" In a caſe where there have beene ſome varietie of opinions in our books, *Littleton* here cleereth the doubt, and that upon a good ground. For hee himſelfe reporteth in our bookes, that it was holden by all the juſtices of England, that a leaſe for life, the reverſion to the plaintife, was a good barre in an aſſiſe, and alſo that a leaſe for yeares, the reverſion to the plaintife, might bee pleaded in an aſſiſe: and ſo of a feoffment in fee with warrantie. And herein the diverſitie of pleading is to be obſerved; for in the caſe here put by *Littleton* of a leaſe for life, the tenant ſhall pleade it in barre; but in a caſe of a leaſe for yeares, or an eſtate of tenant by ſtatute or *elegit*, the defendant ſhall not plead in bar, as to ſay, *aſſiſa non, &c.* but juſtifie by force of the leaſe, &c. and conclude, *& iſſint ſans tort.* And if the tenant of the freehold be not named, he ſhall pleade *nul tenant de franktenement noſme en le briefe:* and in the caſe of the feoffment with warranty he muſt relie upon the warrantie. [229. a.]

Sect. 370.

ITEM pur ceo que tielx conditions ſont plus communement mis & eſpecifies en faits endentes, aſcun petit choſe ſerra icy dit (a toy, monfits) de endenture, et de fait poll concernants conditions. Et eſt d'avoir, que ſe l'endenture ſoit bipartite, ou tripartite, ou quadripartite, touts les parties de

AND for that ſuch conditions are moſt commonly put and ſpecified in deeds indented, ſomewhat ſhall bee here ſaid (to thee, my ſonne) of an indenture, (1) and of a deed pol (2) concerning conditions. And it is to bee underſtood, that if the indenture be bipartite, or tripartite, or quadripartite,

‡ *diſſeiſie—ſeiſie*, L. and M. and Roh.

(1) [See Note 138.] (2) [See Note 139.]

de l'endenture ne ſont que un fait en ley, & cheſcun part de l'endenture eſt de auxy grande force et effect, ſicome touts les parts enſemble.

quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be. (3)

"*EN faits endentes.*" Thoſe are called by ſeverall names, as *ſcriptum indentatum, carta indentata, ſcriptura indentata, indentura, literæ indentatæ.* An indenture is a writing containing a conveyance, bargaine, contract, covenants, or agreements betweene two or more, and is indented in the top or ſide anſwerable to another that likewiſe comprehendeth the ſelf ſame matter, and is called an indenture, for that it is ſo indented, and is called in Greeke συμγεαφον. Vid. ſect. 217. (Ant. 143. b.)

If a deed beginneth, *hæc indentura*, &c. and in troth the parchment or paper is not indented, this is no indenture, becauſe words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting. Lib. 5. fo. 20. Stile's caſe. (2 Roll. Abr. 22. 2 Inſt. 672.) (1 Rep. 173. b.)

"*En faits indent.*" And here it is to be underſtood, that it ought to be in parchment or in paper. For if a writing be made upon a peece of wood, or upon a peece of linen, or in the barke of a tree, or on a ſtone, or the like, &c. and the ſame be ſealed or delivered, yet is it no deed, for a deed muſt be written either in parchment or paper, as before is ſaid, for the writing upon theſe is leaſt ſubject to alteration or corruption. (Ant. 35. b 36. a.) 14 E. 3. Ley 79. 4 E. 2. Fines 116. 4 E. 2. Ley 68. 2 R. 2. Det. 4. 27 H. 6. 9. F. N. B. 122. I. (2 Roll. Abr. 21.)

"*Si l'endenture ſoit bipartite, ou tripartite, ou quadripartite, &c.*" *Bipartite* is, when there be two parts and two parties to the deed. *Tripartite*, when there are three parts and three parties; and ſo of *quadripartite, quinquepartite, &c.*

"*Et de fait poll.*" A deed poll is that which is plaine without any indenting, ſo called becauſe it is cut even, or polled. Every deed that is pleaded ſhall be intended to bee a deed poll, unleſſe it be alleaged ſo to be indented.

"*Touts les parts del endenture ne ſont que un en ley.*" If a man by deed indented make a gift in taile, and the donee dyeth without iſſue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts doe make but one deed in law. 38 H. 6. 24, 25. 9 H. 6. 35. 35 H. 6. 34. 9 E. 3. 18. 9 E. 4. 18. Pl. Com. 134.

"*Et cheſcun part del indenture eſt de auxy grand force, &c.*" This is manifeſt of it ſelfe, and is proved by the bookes aforeſaid.

It is to be obſerved, that if the feoffor, donor, or leſſor ſeale the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never ſealeth the counterpart belonging to the feoffor, &c.

(3) [See Note 140.]

Sect. 371. [229. b.]

ET feaſance de indenture eſt en deux maners. Un eſt de faire eux en le tierce perſon. Un auter eſt de faire eux en le primer perſon. Le feaſance en le tierce perſon eſt come en tiel forme.

Hæc indentura facta inter *R.* de *P.* ex unâ parte, & *V.* de *D.* ex alterâ parte, teſtatur, quò prædictus *R.* de *P.* dedit & conceſſit, & hâc præſenti cartâ indentatâ confirmavit præfato *V.* de *D.* talem terram, &c. Habendum & tenendum, * &c. ſub conditione, † &c. In cujus rei teſtimonium partes prædictæ ſigilla ſua ‡ præſentibus alternatim appoſuerunt. *Vel ſic:* In cujus rei teſtimonium uni parti hujus indenturæ penes præfatum *V.* de *D.* remanenti, prædict' *R.* de *P.* ſigillum ſuum appoſuit, alteri verò parti ejuſdem indenturæ penes *R.* de *P.* remanenti, idem *V.* de *D.* ſigillum ſuum appoſuit. Dat', &c.

Tiel endenture eſt appel endenture fait en le tierce perſon, pur ceo que les verbes, &c. ſont en la tierce perſon. Et tiel forme d'endentures eſt de pluis ſure feaſance, pur ceo que eſt pluis communement uſe, &c.

AND the making of an indenture is in two manners. One is to make them in the third perſon. Another is to make them in the firſt perſon. The making in the third perſon is in this forme.

This indenture made between R. *of* P. *of the one part, and* V. *of* D. *of the other part, witneſſeth, that the ſaid* R. *of* P. *hath granted, and by this preſent charter indented confirmed to the aforeſaid* V. *of* D. *ſuch land, &c. To have and to hold, &c. upon condition, &c. In witneſſe whereof the parties aforeſaid to theſe preſents interchangeably have put their ſeales.* Or thus: *In witneſſe whereof to the one part of this indenture remaining with the ſaid* V. *of* D. *the ſaid* R. *of* P. *hath put his ſeale, and to the other part of the ſame indenture remaining with the ſaid* R. *of* P. *the ſaid* V. *of D. hath put his ſeale. Dated, &c.*

Such an indenture is called an indenture made in the third perſon, becauſe the verbes, &c. are in the third perſon. And this forme of indentures is the moſt ſure making, becauſe it is moſt commonly uſed, &c.

9 E. 3. 18. Vide the books afore rehearſed.

"*ET le feaſance del indenture eſt en deux maners, &c.*" Here is another of our author's perfect diviſions. In this and the next ſection following *Littleton* doth illuſtrate his meaning, by ſetting downe formes and examples which do effectually teach.

Vide 40 E. 3. 2. 7 H. 7. 14. Dier 28 H. 8. 19. lib. 2. fol. 4 & 5. Goddard's caſe. (Ant. 6. a.)

In theſe two formes there are to be obſerved (amongſt other) three generall parts of the ſame, *viz.* the premiſes, the *habendum*, and the *in cujus rei teſtimonium*. But hereof hath been ſpoken at large, *Sect.* 1. 4. & 40; for *Littleton* ſpeaketh not here of the deliverie, but onely of the context or words of the deed.

17 Eliz. Dier 342. 1 R. 3. 14 H. 6. 28. Bab. 12 H 4. 12. 30 Aſſ. 31.

"*Pur ceo que eſt le pluis communement uſe.*" Here it appeareth that which is moſt commonly uſed in conveyances is the ſureſt way. *A communi obſervantiâ non eſt recedendum, & minimè mutanda ſunt quæ certam habuerunt interpretationem. Magiſter rerum uſus.* It is provided by the ſtatute of 38 *E.* 3. *cap.* 4. that all penal bonds in the third

* *&c.* not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *præſentibus*, not in L. and M. nor Roh.

[230. a.] third perſon be void and holden for none, wherein ſome of our bookes [d] ſeem to differ, but they being rightly underſtood, there is no difference at all. For the ſtatute is to be intended of bonds taken in other courts out of the realme, and ſo it appeareth by the preamble of that act. And it was principally intended of the courts of *Rome*, and ſo it appeareth by juſtice *Hankford*, in 2 *H.* 4. in which courts bonds were taken in the third perſon, ſo as ſuch bonds made out of the realm are void; but other bonds in the third perſon are reſolved to be good, as wel as indentures in the third perſon, by the opinion of the whole court in 8 *E.* 4. (1)

[d] 40 E. 3. 1. 2 H. 4. 10. 8 E. 4. 5.

Sect. 372.

*LE feaſance de indenture en le primer perſon eſt *come en tiel forme.* Omnibus Chriſti fidelibus ad quos præſentes literæ indentatæ pervenerint, *A.* de *B.* ſalutem in domino ſempiternam. Sciatis me dediſſe, conceſſiſſe, & hâc præſenti cartâ meâ indentatâ confirmâſſe *C.* de *D.* talem terram, &c. *Vel ſic:* Sciant præſentes & futuri, quòd ego *A.* de *B.* dedi, conceſſi, & hâc præſenti cartâ meâ indentatâ confirmavi *C.* de *D.* talem terram, &c. Habendum † & tenendum, &c. ſub conditione ſequenti, &c. In cujus rei teſtimonium tam ego prædictus *A.* de *B.* quàm prædictus *C.* de *D.* his indenturis ſigilla noſtra alternatim appoſuimus. *Vel ſic:* In cujus rei teſtimonium ‡ ego præfatus *A.* uni parti hujus indenturæ ſigillum meum appoſui, alteri verò parti ejuſdem indenturæ prædictæ *C.* de *D.* ſigillum ſuum appoſuit, &c.

THE making of an indenture in the firſt perſon is as in this forme, *To all Chriſtian people to whom theſe preſents indented ſhall come,* A. *of* B. *ſends greeting in our Lord God everlaſting. Know yee mee to have given, granted, and by this my preſent deed indented confirmed to* C. *of* D. *ſuch land, &c.* Or thus: *Know all men preſent and to come, that I* A. *of* B. *have given, granted, and by this my preſent deed indented confirmed to* C. *of* D. *ſuch land, &c. To have and to hold, &c. upon condition following, &c. In witneſſe whereof, aſwell I the ſaid* A. *of* B. *as the aforeſaid* C. *of* D. *to theſe indentures have interchangeably put our ſeales.* Or thus: *In witneſſe whereof I the aforeſaid* A. *to the one part of this indenture have put my ſeale, and to the other part of the ſame indenture the ſaid* C. *of* D. *hath put his ſeale, &c.*

HERE *Littleton* ſets down three formes of deeds indented in the firſt perſon, *brevis via per exempla, longa per præcepta.* It is requiſite for everie ſtudent to get preſidents and approved formes not onely of deeds according to the example of *Littleton*, but of fines, and other conveyances, and aſſurances, and ſpecially of good and perfect pleading, and of the right entries, and formes of judgements, which will ſtand him in great ſtead, both while he ſtudies, and after when he ſhall give counſell. It is a ſafe thing to follow approved preſidents, for *nihil ſimul inventum eſt, & perfectum.* Vid. Sect. 371.

* *come* not in L. and M. nor Roh.
† *et tenendum*, not in L. and M. nor Roh.
‡ *ego præfatus et*, not in L. and M. nor Roh.

(1) See Mr. Reeves's accurate and learned Hiſtory of the Engliſh Law, vol. 2. p. 67.

Sect.

Sect. 373.

*ET il ſemble que tiel endenture ‖ que eſt fait en le primer perſon eſt auxy bone en la ley, ſicome l'indenture fait en le tierce perſon, quant ambideux parties ont a ceo miſe lour ſeals; car * ſi en l'indenture fait en le tierce perſon, ou en le primer perſon, † mention ſoit fait que le grantor avoit miſe ſolement ſon ſeale, & nemy le grauntee, donques eſt l'indenture tant ſolement le fait le grauntor. Mes l'ou mention eſt fait que le grauntee ad mis ‡ ſon ſeale a l'indenture, &c. donques eſt l'indenture auxy bien le fait le grantee come le fait le grantor, Iſſint il eſt le fait d'ambideux, & auxy cheſcun part de l'indenture eſt le fait d'ambideux parties en tiel caſe.*

AND it ſeemeth that ſuch indenture which is made in the firſt perſon is as good in law, as the indenture made in the third perſon, when both parties have put to this their ſeales; for if in the indenture made in the third perſon, or in the firſt perſon, mention be made that the grantor onely hath put his ſeale, and not the grantee, then is the indenture onely the deed of the grantor. But where mention is made that the grantee hath put to his ſeale to the indenture, &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and alſo each part of the indenture is the deed of both parties in this caſe. [230. b.]

(2 Inſt. 673. Ant. 52. b. 2 Roll. Abr. 22.)

HERE is to be obſerved, that albeit the words in this indenture be onely the words of the feoffor, yet if the feoffee put his ſeale to the one part of the indenture, it is the deed of them both. And in this ſpeciall caſe to make it the deed of the feoffee, it appeareth by *Littleton*, that mention muſt be made in the deed, that hee hath put to his ſeale, for that he is no way made partie to make it, being made in the firſt perſon, but onely by the clauſe of putting his ſeale thereunto. Otherwiſe it is of a deed indented in the third perſon, as before it appeareth, for there hee is made partie to the deed in the beginning. And *Littleton*'s rule is true, that every part of an indenture is the dede of both parties; for, as it hath beene ſaid, both parts make but one deed in law in that caſe.

Sect. 374.

ITEM ſi eſtate ſoit fait per indenture a un home pur terme de ſa vie, le remainder a un auter en fee ſur certaine condition, &c. & ſi le tenant a terme de vie avoit mis ſon ſeale al part de l'indenture, & puis moruſt, & il que eſt en le remainder entre en la terre per force de ſon remainder, &c. en ceſt cas il eſt tenus de performer touts les conditions

ALSO if an eſtate bee made by indenture to one for terme of his life, the remainder to another in fee upon a certaine condition, &c. and if the tenant for life have put his ſeale to the part of the indenture, and after dieth, and he in the remainder entreth into the land by force of his remainder, &c. in this caſe hee is tied to

‖ *que eſt*, not in L. and M. nor Roh.
* *ſi* not in L. and M. nor Roh.
† *ſi* added in L. and M. and Roh.
‡ *ſon ſeale* not in L. and M. nor Roh.
‖ *et* added in L. and M. and Roh.

conditions compriſe en l'endenture, ſicome le tenant a terme de vie devoit faire en ſa vie, et uncore ceſtuy en le remainder ne unques en ſeale aſcun part del endenture. Mes la cauſe eſt, que entant que il enter et agreea d'aver les terres per force del endenture, il eſt tenus de performer les conditions deins meſme l'endenture, s'il voile aver la terre, &c.

to performe all the conditions compriſed in the indenture, as the tenant for life ought to have done in his life time, and yet he in the remainder never ſealed any part of the indenture. But the cauſe is, for that, inaſmuch as hee entred and agreed to have the lands by force of the indenture, hee is bound to performe the conditions within the ſame indenture, if he will have the land, &c.

"*SUR certaine condition, &c.*" Here by this (*&c.*) is implied, that the condition in this caſe doth extend both to the eſtate for life, and to the remainder, but by ſpeciall limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the indenture (the parties thereunto only being the leſſor and the tenant for life) yet when hee in the remainder entreth and agreeth to have the lands by force of the (1) indenture, he is bound to performe the conditions contained in the indenture. And here is alſo a diverſitie to be underſtood, [231. a.] that any eſtranger to the indenture may take by way of remainder, but he cannot in this caſe take any preſent eſtate in poſſeſſion, becauſe he is an eſtranger to the deed. (1)

(1 Roll. Abr. 422. 474.)

(10 Rep. Doct. Ball's caſe, cited in Portington's caſe.)

(2 Cro. 240. 399. 522.)

(2 Inſt. 673.). (2 Roll. Abr. 22.)

If *A.* by deed indented betweene him and *B.* letteth lands to *B.* for life, the remainder to *C.* in fee, reſerving a rent, tenant for life dieth, he in the remainder entreth into the lands, he ſhal be bound to pay the rent, for the cauſe and reaſon before yeelded by *Littleton*. An indenture of leaſe is engroſſed betweene *A.* of the one part, and *D.* and *R.* of the other part, which purporteth a demiſe for yeares by *A.* to *D.* and *R.* *A.* ſealeth and delivereth the indenture to *D.* and *D.* ſealeth the counterpane to *A.* but *R.* did not ſeale and deliver it. And by the ſame indenture it is mentioned, that *D.* and *R.* did grant to be bound to the plaintife in 20 pound in caſe that certaine conditions compriſed in the indenture were not performed. And for this 20 pound *A.* brought an action againſt *D.* onely, and ſhewed forth the indenture. The defendant pleaded, that it is proved by the indenture that the demiſe by indenture was made to *D.* and *R.* which *R.* is in full life, and not named in the writ, judgment of the writ. The plaintife replyed, that *R.* did never ſeale and deliver the indenture, and ſo his writ was good againſt *D.* ſole. And there the counſell of the plaintife tooke a diverſitie betweene a rent reſerved which is parcell of the leaſe, and the land charged therewith, and a ſumme in groſſe, as here the twenty pound is; for as to the rent they agreed that by the agreement of *R.* to the leaſe, he was bound to pay it, but for the 20 pound that is a ſumme in groſſe, and collateral to the leaſe, and not annexed to the land, and groweth due onely by the deed, and therefore *R.* ſaid hee was not chargeable therewith, for that he had not ſealed and delivered the deed. But inaſmuch as hee had agreed to the leaſe which was made by indenture, he was chargeable by the indenture for the ſame ſumme in groſſe; and for that *R.* was not named in the writ, it was adjudged that the writ did abate.

(50 E. 3. 22. 8 H. 6. 26. b. (1 Roll. 474.) (5 Rep. 16.)

38 E. 3. 8. a. 3 H. 6. 26. b. Vide 45 E. 3. 11, 12.

"*Aver*

(1) [See Note 141.]

[231. a.]

(1) [See Note 142.]

"*Aver la terre, &c.*" Here is implyed an ancient maxime of the law, viz. *Qui ſentit commodum ſentire debet et onus, et tranſit terra cum onere.*

(5 Rep. 76.)
(1 Rep. 38.)

Sect. 375.

*ITEM ſi feoffment ſoit fait per fait poll ſur condition, * et pur ceo que le condition n'eſt pas performe le feoffor entra et happa la poſſeſſion de le fait poll, ſi le feoffee port un action de cel entrie envers le feoffor, il ad eſte queſtion ſi le feoffor poit pleder le condition per le dit fait poll encounter le feoffee. Et aſcuns ont dit que non, entant que il ſemble a eux que un fait poll, et le propertie de meſme le fait appertient a celuy a que le fait eſt fait, et nemy a celuy que fiſt le fait. Et entant que tiel fait ne attient al feoffor, il ſemble a eux que il ne poit pas ceo pleder.† Et auters ont dit le contrarie, et ont monſtre divers cauſes. Un eſt, ſi le caſe ſuit tiel, que en action perenter eux, ſi le feoffee pleder meſme le fait, et monſtre ‡ eſt ‡ al court, en ceſt cas entant que le fait eſt en court, le feoffor poit monſtrer al court coment en le fait ſont divers conditions d'eſtre performes ‖ de le part le feoffee, &c. et pur ceo que ils ne fueront performes, il enter, &c. et a ceo il ſerra reſceive. Per meſme le reaſon quant le feoffor ad le fait en poigne, et ceo monſtra a le court, il ſerra § bien reſceive de ceo pleder, &c. et noſment quant le feoffor eſt privie al fait, car ¶ covient eſtre privie al fait quant il fiſt le fait, &c.*

ALSO if a feoffment bee made by deed poll upon condition, and for that the condition is not performed the feoffor entreth and getteth the poſſeſſion of the deed poll, if the feoffee brings an action for this entrie againſt the feoffor, it hath beene a queſtion if the feoffor may plead the condition by the ſaid deed poll againſt the feoffee. And ſome have ſaid hee cannot, [231. b.] inaſmuch as it ſeemes unto them that a deed poll, and the propertie of the ſame deed belongeth to him to whom the deed is made, and not to him which maketh the deed. And inaſmuch as ſuch a deed doth not appertaine to the feoffor, it ſeemes unto them that he cannot plead it. And others have ſaid the contrary, and have ſhewed divers reaſons. One is, If the caſe were ſuch, that in an action betweene them, if the feoffee pleade the ſame deed, and ſhew it to the court, in this caſe inſomuch as the deed is in court, the feoffor may ſhew to the court how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and becauſe they were not performed he entred, &c. and to this he ſhall be received. By the ſame reaſon when the feoffor hath the deed in hand, and ſhew this to the court, he ſhall well be received to pleade it, &c. and namely when the feoffor is privy to the *fait*, for hee muſt be privie to the deed when he makes the deed, &c.

[a] Vid. ſect. 170. 302. 340.

HERE the latter opinion is cleere law at this day, and is *Littleton's* owne opinion [a], as before hath beene obſerved.

"*Ont*

* *&c.* added in L. and M. and Roh.
† *&c.* added in L. and M.
‡ *ceo*, L. and M. and Roh.
‡ *eſt* not in L. and M. nor Roh.
‖ *de le part le feoffee, &c. et pur ceo que ils ne fuerent performes*, not in L. and M. nor Roh.
§ *de ceo* added in L. and M.
¶ *il* added in L. and M. and Roh.

" Ont monſtre divers cauſes."

Felix qui potuit rerum cognoſcere cauſas.
Et ratio melior ſemper prævalet.

" Entant que le fait eſt en court, &c." And herewith doe agree [b] many authorities in law. [c] And if the deed remaine in one court, it may be pleaded in another court, without ſhewing forth; *quia lex non cogit ad impoſſibilia.* 24 E. 3. 73. 45 E. 3. Monſtrans des faits. 55. [b] 40 Aſſ. 34.

lib. 5. 75. b. Wymark's caſe. [c] 12 H. 4. 8. 42 E. 3. 27. Wymark's caſe, ubi ſupra. 38 H. 6. 2. 41 Aſſ. 29. 12 H. 4. 8. 7 H. 4. 39. 11 H. 4. 73. 45 E. 3. 11. F. N. B. 243.

" De part le feoffee, &c." Here alſo is implyed if the condition be to be performed on the part of the feoffor or by a ſtranger; and it is to be underſtood that when a deed is ſhewed forth to the court, the deed ſhall remaine in court all that tearm in the cuſtody of the *cuſtos brevium*, but at the end of the tearme (if the deed be not denied) then the law adjudgeth the deed in the cuſtody of the party to whom it belongeth, for a man's evidences are as it were the ſinewes of his land. But if the deed be denied, then the deed in judgment of law remaineth in court untill the plea be determined (1). The reſidue of this ſection needeth no explication. (5 Rep. 75, 76.)

[232. a.] Sect. 376.

*AUXY ſi deux homes font un treſpas a un auter, le quel releaſe a un d'eux per ſon fait touts actions perſonals, & nient obſtant il ſuiſt action de treſpaſſe envers l'auter, le defendant bien poit monſtrer que le treſpaſſe fuit fait per luy, et per un auter ſon companion, et que le plaintife per *ſon fait que il monſtre avant releſſa a ſon companion touts actions perſonals, judgment ſi action, &c. et uncore tiel fait appertient a ſon companion, & nemy a luy. Mes pur ceo que il poit aver advantage per le fait, ſi voit monſtrer le fait al court, il poit † ceo bien pleder, &c. Per meſme le reaſon ‡ poit le feoffor en l'auter cas, quant § il doit aver advantage per le condition ‖ compris deins le fait poll ¶.*

ALSO if two men doe a treſpaſſe to another, who releaſes to one of them by his deed all actions perſonalls, and notwithſtanding ſueth an action of treſpaſſe againſt the other, the defendant may wel ſhew that the treſpaſſe was done by him, and by another his fellow, and that the plaintife by his deed (which he ſheweth forth) releaſed to his fellow all actions perſonals, and demand the judgement, &c. and yet ſuch deed belongeth to his fellow, and not to him. But becauſe hee may have advantage by the deed, if hee will ſhew the deed to the court, he may well plead this, &c. By the ſame reaſon may the feoffor in the other caſe, when he ought to have advantage by the condition compriſed within the deed poll.

* *ſon—le*, L. and M. and Roh.
† *pur* added L. and M.
‡ *poit le feoffor* not in L. and M. nor Roh.
§ *le feoffor*, L. and M. and Roh.
‖ *compris* not in L. and M. nor Roh.
¶ *&c.* added L. and M. and Roh.

(1) [See Note 143.]

27 E. 3 83. 13 E. 4. 2. 15 E. 4. 26. 21 E. 4. 72. 22 E. 4. 7. 8 H. 6. 15. 20 H. 6. 11. 21 H. 6. Arbitrement 41. 2 R. 3. 9. a. 14 H. 8. 10. 34 H. 8. tit. Eſtrange al fait 21. 3 H. 6. 18. 26.

"*SI deux homes ſont un treſpaſſe a un auter, &c.*" Here by this ſection it is to bee underſtood, that when divers doe a treſpaſſe, the ſame is joynt or ſeverall at the wil of him to whom the wrong is done, yet if he releaſe to one of them, all are diſcharged, becauſe his own deed ſhall be taken moſt ſtrongly againſt himſelfe, but otherwiſe it is in caſe of appeale of death, &c. As if two men bee joyntly and ſeverally bounden in an obligation, if the obligee releaſe to one of them, both are diſcharged; and ſeeing the treſpaſſers are parties and privies in wrong, the one ſhall not plead a releaſe to the other without ſhewing of it forth, albeit the deede appertaine to the other. (1)

(11 Rep. 5. 2 Roll. Abr. 412. Hob. 66. 2 Sid. 41. Ant. 125. b.)

13 E. 2. tit. Monſtrans des faits 42. (Plo. 439. b. Dyer 344. 6 Rep. 7. 10 Rep. 93. b.)

If an action of debt upon an obligation bee brought againſt an heire, he may pleade in barre a releaſe made by the obligee to the executors. But albeit the deed belong to another, yet muſt he ſhew it forth, for both of them are privie to the teſtator.

"*Per meſme le reaſon.*" *Ubi eadem ratio, ibi idem jus.*

Sect. 377.

*AUXY ſi le feoffee donaſt ou grantaſt le fait poll al feoffor, tiel grant ſerra bone, et donques le fait & le propertie del fait appertient al feoffor, &c. Et quant le feoffor ad le fait en poigne, et * eſt pleid al court, il ſerra plus toſt entendue, que il vient al fait per loyal meane, que per tortious meane. Et iſſint, a eux ſemble que le feoffor poet bien pleder tiel fait polle que comprent condition, &c. s'il ad le fait en poigne.†* Ideo ſemper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.

ALSO if the feoffee granteth the deed to the feoffor, ſuch grant ſhall bee good, and then the deed and the propertie thereof belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and is pleaded to the court, it ſhall be rather intended, that he commeth to the deed by lawfull meanes, then by a wrongfull mean. And ſo it ſeemeth unto them, that the feoffor may wel plead ſuch deed poll which compriſeth the condition, &c. if he hath the ſame in hand. *Ideo ſemper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.*

(1 Rep. 1.)

"*LE propertie del fait appertient al feoffor.*" Hereby it appeareth that a man may give or grant his deed to another, and ſuch a grant by *paroll* is good. And it is alſo implied, that if a man hath an obligation, though he cannot grant the thing in action, yet hee may give or grant the deed, *viz.* the parchment and waxe to another, who may cancell and uſe the ſame at his pleaſure. (1) [232. b.]

(Ant. 214. a. Poſt. 260. 280. 2 Roll. Abr. 45, 46. 48. 1 Sid. 212, 213.)

"*Serra*

* *eſt—ceo,* L. and M. and Roh.

† *&c.* added L. and M. and Roh.

(1) [See Note 144.]

[232. b.]

(1) [See Note 145.]

" *Serra pluis toſt entend', que il vient al fait per loyall meane, que per tortious meane.*" *Omnia præſumuntur legitimè facta, donec probetur in contrarium. Injuria non præſumitur.*

" *Quære de dubiis.*" There be three kinds of unhappie men.

1. *Qui ſcit & non docet*, Hee that hath knowledge and teacheth not.

2. *Qui docet & non vivit*, He that teacheth, and liveth not thereafter.

3. *Qui neſcit, & non interrogat*, He that knoweth not, and doth not enquire to underſtand. Therefore *Littleton* ſaith, *Quære de dubiis.*

Infelix cujus nulli ſapientia prodeſt.
Infelix qui recta docet, cum vivit iniquè.
Infelix qui pauca ſapit ſpernitque doceri.

" *Quia per rationes pervenitur ad legitimam rationem.*" For *Ratio eſt radius divini luminis.* And by reaſoning and debating of grave learned men the darkneſſe of ignorance is expelled, and by the light of legall reaſon the right is diſcerned, and thereupon judgment given according to law, which is the perfection of reaſon. This is of *Littleton* here called *legitima ratio*, whereunto no man can attaine but by long ſtudie, often conference, long experience, and continuall obſervation.

Certaine it is, that in matters of difficultie the more ſeriouſly they are debated and argued, the more truely they are reſolved, and thereby new inventions juſtly avoided.

Inter cuncta leges, & percunctabere doctos.

Sect. 378.

ESTATES que homes ont ſur condition en ley, ſont ticls eſtates que ont un condition per la ley a eux annex, comment que ne ſoit ſpecifie en eſcript. Si come home grant per ſon fait a un auter l'office de parkerſhip de un park a auter, et occupier meſme l'office pur terme de ſon vie, l'eſtate que il ad en l'office eſt ſur condition en ley, c'eſtaſcavoir, que le parker bien et loyalment gardera le park, et ferra ceo que a tiel office appertient a faire, ou auterment bien lirroit al grauntor et a ſes heires de luy ouſte, et de granter ceo a un auter s'il voit, &c. Et tiel condition que eſt entendus per la ley eſtre annexe a aſcun choſe, eſt auxy

ESTATES which men have upon condition in law, are ſuch eſtates which have a condition by the law to them annexed, albeit that it be not ſpecified in writing. As if a man grant by his deed to another the office of parkerſhip of a park, to have and occupie the ſame office for terme of his life, the eſtate which he hath in the office is upon condition in law, to wit, that the parker ſhall well and lawfully keepe the parke, and ſhall doe that which to ſuch office belongeth to doe, or otherwiſe it ſhall be lawful to the grantor and his heires to ouſt him, and to grant it to another if he will, &c. And ſuch

auxy fort ſicome la condition fuiſſoit mis en eſcript.*

ſuch condition as is intended by the law to be annexed to any thing, is as ſtrong as if the condition were put in writing.

"*CONDITION en ley, &c.*" *Littleton* having ſpoken of conditions in deed, now according to his owne diviſion commeth to ſpeake of conditions in law.

"*Que ne ſoit ſpecifie en eſcript.*" A condition in law is that which the law intendeth or implyeth without expreſſe words in the deed.

(Ant. 2. a. 115. a. Cro. Car. 59, 60. 3 Inſt. 76. 4 Inſt. 289. Hutt. 86, 87.)

"*Que le parker bien et loyalment gardera le parke,*' &c." [233. a.] *Parke*, this ſhould be written *parque*, which is a *French* word, and ſignifieth that which we vulgarly call a parke, of the *French* word *parquer*, to imparke, to incloſe. It is called in *Domeſday*, *Parcus*. In law it ſignifieth a great quantity of ground incloſed, privileged for wild beaſts of chaſe by preſcription, or by the king's grant.

(8 Rep. 136.) (F.N.B. 164. d.) (5 Rep. 104. b.) [*d*] Hill. 13 E. 3. coram rege in Theſaur. (7 Rep. 15.)

The beaſts of parque, or chaſe, properly extend to the bucke, the doe, the foxe, the marten, the roe, but in a common and legall ſenſe, to all the beaſts of the forreſt. There be both beaſts and fowles of the warren. Beaſts, as hares, conies, and roes called in records [*d*] *Capreoli*. Fowles of two ſorts, viz. *Terreſtres* and *Aquatiles*. *Terreſtres* of two ſorts, *Silveſtres* and *Campeſtres*: *Campeſtres*, as partridge, quaile, raile, &c. *Silveſtres*, as pheſant, woodcocke, &c. *Aquatiles*, as mallard, herne, &c. whereof I have ſeen in this record [*]: *Rex conceſſit Johanni de Beverly Armigero ſuo quòd ipſe cum quibuſcunque canibus ſuis ad quaſcunque beſtias feras regis in quibuſcunque foreſtis, parcis ſuis quotieſcunque volucrit venari poſſit, et quoſcunque falcones poſſit permittere volare ad quaſcunque aves de warrend in quibuſcunque ripariis, &c.*

[*] 38 E. 3. rot. patent pars 1. m. 10.

[*e*] Hill. 13 E. 3. coram rege in Theſaur.

It is reſolved [*e*] by the juſtices and the king's counſell, that *capreoli*, *id eſt* roes, *non ſunt beſtiæ de foreſtâ, eò quòd fugant alias feras*. Beaſts of forreſts be properly hart, hind, bucke, hare, boare, and wolfe, but legally all wild beaſts of venery.

A foreſt and chaſe are not, but a parke muſt be incloſed. The foreſt and chaſe doe differ in offices and lawes: every foreſt is a chaſe, but every chaſe is not a foreſt. A ſubject may have a foreſt by eſpeciall grant of the king, as the duke of *Lancaſter* and abbot of *Whitbie* had.

Vide Sect. 1.

Vide Bract. fo. 231 & 316. Britton fo. 34. Fleta lib. 2. cap. 34, 35.

Ockam cap. quid regis foreſta, ſaith, *Foreſta eſt tuta ferarum manſio non quarumlibet, ſed ſilveſtrium, non quibuſlibet in locis, ſed certis, et ad hoc idoneis; unde foreſta* E. *mutata in* O. *quaſi foreſta, hoc eſt, ferarum ſtatio.*

Pudzeld or *Woodgeld* is to be free from payment of money for taking of wood in any foreſt. But let us now returne to our *Littleton*.

(9 Rep. 50. Sid. 14.)

In this Section *Littleton* putteth an example of a condition in law annexed to the office of the keeper of a park, but this example muſt be underſtood with a diſtinction; for if the parker doth not attend on the parke one or two, &c. dayes, this is no forfeiture of the office of parkerſhip; but if in his default any deere be killed, and ſo a damage to the lord, that is a forfeiture: for (that it may be ſaid once

5 E. 4. 15. b. Lib. 5. E. 4. 26. Pl. Com. 379, 380.

* *ceaunſire*, added in L. and M. and Roh.

once for all) non-uſer of itſelfe without ſome ſpeciall damage is no forfeiture of private offices, but non-uſer of publique offices which concern the adminiſtration of juſtice, or the common wealth, is of it ſelf a cauſe of forfeiture. 2 H. 7. 11. 30 A. 6. 32, &c. (Cro. Rep. 11. And. Curl caſe.)

"*Luy ouſter s'il voit, &c.*" *Littleton* here ſpeaketh of an ouſter by force of a condition in law, therefore it is to be ſeen in what other caſes the grantor may lawfully ouſt his officer. (1)

There is a diverſitie between officers that have no other profit but a collaterall certain fee, for there the grantor may diſcharge him of his ſervice, as to be a bayly, receiver, ſurveyor, auditor, or the like, the exerciſe whereof is but labour and charge to him, but hee muſt have his fee: for the maine rule of law is, that no man can fruſtrate or derogate from his owne grant to the prejudice of the grantee. And where albeit the grantee hath no other profit but his fee, yet that fee is to be perceived and taken out of the profits appertaining to the lord within his office, for there the grantor cannot diſcharge him of his ſervice or attendance, for that may turn to the prejudice of the grantee, if the grantor will not grant the office at all. But in all caſes where the officer relinquiſheth his office, and refuſeth to attend, he loſeth his office, fee, profit, and all. [233. b.] 18 E. 4. 8. 31 H. 8. grants. Br. 134. 34 H. 8. ibid. 93. 11 Eliz. Dyer 285. (Plo. 379. b. 381. b. F. N. B. 164. Sid. 74. 81. 2 Roll. Abr. 155. 9 Rep. 50. Cro. Car. 55, 56. 59, 60, 61.)

There is another diverſity where the grantee, beſides his certaine fee, hath profits and availes by reaſon of his office; there the grantor cannot diſcharge him of his ſervice or attendance, for that ſhould be to the prejudice of the grantee. As if a man doth grant to another the office of the ſtewardſhip of his courts of his mannors with a certain fee, the grantor cannot diſcharge him of his ſervice and attendance, becauſe he hath other profits and fees belonging to his office, which he ſhould loſe if he were diſcharged of his office. And as in the caſe which *Littleton* here putteth of the office of the keeper of a parke, for that hee hath not onely his fee certaine, but profits and availes alſo, in reſpect of his office, as deere ſkinnes, ſhoulders, &c. But now let us proceed and ſee what other particular forfeitures in law bee of this office here ſpoken of by *Littleton*, and ſomewhat of conditions in law in generall. 22 H. 6. 10. 3. 6 E. 6. Dier 71.

And it is to be underſtood, that if any keeper kill any deere without warrant, or fell or cut any trees, woods, or underwoods, and convert them to his owne uſe, it is a forfeiture of his office, for the deſtruction of vert is, by a meane, deſtruction of veniſon. So it is if he pull downe the lodge, or any houſe within the park for putting of hay into it for feeding of the deere or ſuch like, it is a forfeiture; and the reaſon wherefore the office in theſe and in like caſes ſhall be forfeited [*f*] is, *quia in quo quis delinquit in eo de jure eſt puniendus.* (Ant. 54. a.) 15 E. 4. 3. b. 5 E. 4. 26. 28 H. 8. Bendloes enter eveſque de Londres & Hieron. lib. 9. fo. 50. 95, 96. 9. [*f*] Mich. 33 E. 1. coram rege in Theſaur. l'eveſque de Durhaith's caſe. Pl. Com. 373. a. Sir Henric Nevill's caſe.

As to conditions in law, you ſhal underſtand they bee of two natures, that is to ſay, by the common law, and by ſtatute. And thoſe by the common law are of two natures, that is to ſay, the one is founded upon ſkill and confidence, the other without ſkill or confidence: upon ſkill and confidence, as here the office of parkerſhip, and other offices in the next Section mentioned, and the like.

Touching conditions in law without ſkill, &c. ſome be by the common law, and ſome by the ſtatute. By the common law as to every eſtate of tenant by the courteſie, tenant in tayle after poſſibility of iſſue extinct, tenant in dower, tenant for life, tenant for years, 21 E. 4. 20. 93. (1 Rep. 14. b.) Lib 8. fo. 44. Wit ugham's caſe.

(1) [See Note 146.]

years, tenant by ſtatute merchant or ſtaple, tenant by *elegit*, gardian, &c. there is a condition in law ſecretly annexed to their eſtates, that if they alien in fee, (1) &c. that he in the reverſion or remainder may enter, *et ſic de ſimilibus*, or if they claime a greater eſtate in court of record, and the like.

Concerning conditions in law founded upon ſtatutes, for ſome of them an entrie is given, and for ſome other a recovery by action: where an entrie is given, as upon an alienation in mortmaine, &c. and the like: where an action is given, as for waſte againſt tenant for life and yeares, and the like.

"*Et tiel condition que eſt entendus per la ley eſtre annex a aſcun choſe, eſt auxi fort*, &c." Here it is worthy the obſervation to take a view of the diviſions aforeſaid in ſome particular caſe. As for example. Admit that an office of parkerſhippe bee granted or deſcend to an infant or feme covert, if the conditions in law annexed to this office which require ſkill and confidence be not obſerved and fulfilled, the office is loſt for ever, becauſe, as *Littleton* ſaith here, it is as ſtrong as an expreſſe condition. But if a leaſe for life be made to a fem covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, that is, without ſkill, &c. is no abſolute forfeiture of their eſtate. So of a condition in law given by ſtatute, which giveth an entrie onely. As if an infant or feme covert with her huſband alien's by charter of feoffment in *mortmaine*, this is no barre to the infant, or feme covert. But if a recovery be had againſt an infant or fem covert in an action of waſte, there they are bound and barred for ever.

(Cro. Car. 279.) (Lib. 8. fo. 44. Wittingham's caſe. (Mo. 92. 1 Cro. 7. 9 Rep. 72. Plo. 205. Ant. 100.)

And it is to be obſerved, that a condition in law by force of a ſtatute which giveth a recovery, is in ſome caſes more ſtrong than a condition in law without a recovery. For if leſſee for life make a leaſe for yeares, and after enter into the land, and make waſte, and the leſſor recover in an action of waſte, he ſhall avoid the leaſe made before the waſte done. But if the leſſee for life make a leaſe for years, and after enter upon him, and make a feoffment in fee, this forfeiture ſhall not avoid the leaſe for yeares. Nor in any of the ſaid caſes a precedent rent granted out of the land ſhal be avoyded. For if leſſee for life grant a rent charge, and after doth waſte, and the leſſor recovereth in an action of waſt, he ſhall hold the land charged during the life of the tenant for life, but if the rent were granted after the waſte done, the leſſor ſhall avoid it.

(Ant. 185. a.) [234. a.]

And the reaſon wherefore the leaſe for years in the caſe aforeſaid ſhall be avoyded, is becauſe of neceſſitie the action of waſte muſt be brought againſt the leſſee for life, which in that caſe muſt bind the leſſee for yeares, or elſe by the act of the leſſee for life the leſſor ſhould be barred to recover *locum vaſtatum*, which the ſtatute giveth. (1)

(Ant. 54.)

If a man hath an office for life which requireth ſkill and confidence, to which office he hath a houſe belonging, and chargeth the houſe with a rent during his life, and after commit a forfeiture of his office, the rent charge ſhall not be avoyded during his life, for regularly a man that taketh advantage of a condition in law ſhal take the land with ſuch charge as he finds it. And therefore *Littleton* is here to be underſtood, that a condition in law is as ſtrong as a condition

(Poſt. 338. b.)

(1) [See Note 147.] (1) [See Note 148.]

condition in deed, as to avoid the eſtate or intereſt it ſelfe, but not to avoide precedent charges, but in ſome particular caſes, as by that which hath beene ſaid appeareth.

There be at this day more conditions in law annexed to offices than were when *Littleton* wrote: for example, for offices in any wiſe touching the adminiſtration or execution of juſtice, or clerkſhip in any court of record, or concerning the king's treaſure, revenue, account, cuſtomes, alnage, auditorſhip, king's ſurveyor, or keeping of any of his majeſties caſtles, forts, &c. For if any of theſe officers bargaine or ſell any of the ſaid offices or any deputation of the ſame, or take any money or profit, or any promiſe, covenant, bond, or aſſurance, to have any money or reward for the ſame, the perſon ſo bargaining or ſelling, or that ſhal take any ſuch promiſe, covenant, bond, or aſſurance, ſhall not only forfeit his eſtate, but alſo every perſon ſo buying, giving or aſſuring, be adjudged a diſabled perſon to have or enjoy the ſame office or offices, deputation or deputations, &c. and that all ſuch bargains, ſales, promiſes, covenants, and aſſurances, as be before ſpecified, ſhall be voide, except as in the ſaid act is excepted. 3 H. 7. ca. 12. Auditor, receiver, bailiſe, keeper of a caſtle, maſter of the game, keeper or parker of any forreſt, parke, chaſe, &c. 7 E. 6. ca. 1. Treaſurer, receiver, collector, bailiſe, &c. (Vid. Ant, 3. 6. 11 Rep. 89.) 5 E. 6. ca. 16. (Cro. Car. 557. Cro. Jac. 386. 3 Luſt. 154.)

Sir *Robert Vernon*, knight, being coferer of the king's houſe of the king's gift, and having the receit of a great ſumme of money yearely of the king's revenue, did for a certaine ſumme of money bargain and ſell the ſame to ſir *A. I.* and agreed to ſurrender the ſaid office to the king, to the entent a grant might be made to ſir *A.* who ſurrendred it accordingly: and thereupon ſir *A.* was by the king's appointment admitted and ſworne coferer. And it was reſolved by ſir *Thomas Egerton*, lord chancellour, the chiefe juſtice, and others to whom the king referred the ſame, that the ſaid office was void by the ſaid ſtatute, and that ſir *A.* was diſabled to have or to take the ſaid office, and that no *non obſtante* could diſpenſe with this act to enable the ſaid ſir *A.* for the reaſon and cauſe before-mentioned, Sect. 180. And hereupon ſir *A.* was removed, and ſir *Marmaduke Darrell* ſworne (by the king's commandement) in his place. And note, that all promiſes, bonds and aſſurances, as wel on the part of the bargainor as of the bargainee, are void by the ſame act. [*] *Nullâ aliâ re magis Romana reſpublica interiit, quàm quòd magiſtratûs officia venalia erant.* Mich. 13 Jacobi Regis. Lib. 3. fo. 82. Colſhil's caſe, [*] Ærod, fo. 353.)

[g] *Jugurtha* going from Rome, ſaid to the city, *Vale venalis civitas, mox peritura ſi emptorem invenias.* [g] Saluſt.

Therefore by the law of *England* it is further provided, that no officer or miniſter of the king ſhall be ordained or made for any gift or brocage, favour or affection, nor that any which purſueth by him or any other, privily or openly, to be in any manner of office, ſhall be put in the ſame office or in any other, but that all ſuch officers ſhall be made of the beſt and moſt lawfull men and ſufficient: a law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never ſhall juſtice be duely adminiſtred but when the officers and miniſters of juſtice be of ſuch quality, and come to their places in ſuch manner as by this law is required. 12 R. 2. ca. 2.

" *Tiel condition que eſt entendus per la ley eſtre annex a aſcun choſe, eſt auxy fort ſicome la condition fuit miſe in eſcript.*" And this accords with that ancient rule, *Utique fortior et potentior eſt diſpoſitio legis quàm hominis.* Vide Sect. 418. 429, 430

Sect. 379. [234. b.]

*EN meſme le maner eſt de grants d'offices de ſeneſchal, conſtabularie, bedelary, bailiwick, ou auters offices, &c. Mes ſi tiel office ſoit grant a un home, a aver et occupier per luy ou ſon deputie, donque ſi l'office ſoit occupy per luy ou per ſon deputie, ſicome il devoit per le ley eſtre occupie, ceo ſuffiſt pur luy, ou auterment * le grantor et ſes heires poient ouſte † le grantee, come eſt avantdit.*

IN this manner it is of grants of the offices of ſteward, conſtable, bedelarie, bayliwick, or other offices, &c. But if ſuch office bee granted to a man, to have and to occupie by himſelfe or his deputie, then if the office bee occupied by him or his deputie, as it ought by the law to bee occupied, this ſufficeth for him, or otherwiſe the grantor and his heires may ouſte the grantee, as is aforeſaid.

21 E. 4. 20. Pl. Com. 379. (Ant. 61. a.)

"*SENESCHALL.*" Of this I have ſpoken before.

8 E. 4. 6. (5 Rep. 59.)

"*Conſtabularie.*" Of this likewiſe ſomething hath beene ſpoken before. But a conſtable is often taken in the law for a warden or keeper, as *Conſtabularius caſtri de Dover et 5. portuum*; for the warden of the caſtle of *Dover* and the Cinque ports, &c. So as in this ſenſe *Conſtabularius* is taken for *Caſtellanus*, and this is proved by the ſtatute (*) of *W.* 1. *ca.* 7. *Des priſes des Conſtables ou Caſtellains faitz des auters*, &c. And *Magna Carta*, (*b*) *c.* 19. *Nullus conſtabularius vel ejus ballivus capiat blada vel alia catalla alicujus qui non ſit de villâ, ubi caſtrum ſuum ſitum eſt*, &c. *Stanford fo.* 152. *Conſtabularius Turris London*, for *Cuſtos Turris*, 32 *H.* 8. *ca.* 28. Conſtable of the Foreſt, for the Keeper of the Foreſt.

(*) W. 1. ca. 7.

[b] Magna Carta, ca. 19.

Stanf. fo. 152.

32 H. 8. ca. 28.

"*Bedelarie.*" Bedell is derived of the *French* word *Beadeau*, which ſignifies a meſſenger of the court, or under baylife, in *Latine Bedellus*.

And the oath of a bedell of a manor is, that he ſhall duly and truly execute all ſuch attachements and other proces as ſhall be directed to him from the lord or ſteward of his court, and that he ſhall preſent all pound breaches which ſhall happen within his office, and all chattels wayved, and eſtrayes.

"*Bayliwicke.*" Of this ſufficient hath beene ſaid before.

* *le grantor—il*, L. and M. and Roh. † *le grantee* not in L. and M. nor Roh.

Sect. 380.

ITEM, eſtates de terres ou tenements purront eſtre ſur condition en ley, coment que ſur l'eſtate fait ne fuit aſcun mention ou reherſal fait de le condition. Sicome mitiomus que un leas ſoit fait a le baron et a ſa feme, a aver et tener a eux durant le coverture enter eux; en ceſt cas ils ont eſtate pur terme de lour deux vies ſur condition en ley, ſcilicet, *ſi un de eux devie, ou que divorce ſoit fait enter eux, donque bien lirroit a le leſſor et a ſes heires d'entrer, &c.*

ALSO, eſtates of lands or tenements may bee made upon condition in law, albeit upon the eſtate made there was not any mention or reherſall made of this condition. As put the caſe that a leaſe be made to the huſband and wife, to have and to hold to them during the coverture betweene them; in this caſe they have an eſtate for terme of their two lives upon condition in law, *ſcil.* if one of them die, or that there be a divorce between them, then it ſhall bee lawfull for the leſſor and his heires to enter, &c.

HERE *Littleton* termeth words of limitation to be conditions in law: for his firſt example is, (1 Roll. Abr. 411. Ant. 214. b. Poſt. 242.)

"*Durant le coverture enter eux,*" *durante cooperturâ inter eos.* This word (*durante*) is properly a word of limitation, as *durante viduitate*, or *durante virginitate*, or *durante vitâ, &c.* And properly a condition in law is, as hath beene ſaid, where the law [235. a.] createth the ſame without any expreſſe words. 37 H. 6. 27.

Dum alſo maketh a limitation; as if a leaſe be made, *dum ſola fuerit*, or *dum ſola et caſta vixeret*. *Dummodo* is alſo a word of limitation; as *dummodo ſolveret talem redditum*. *Quamdiu* alſo is a word of limitation, for if a man grant a rent out of the mannor of *D.* *quamdiu* the grantor ſhall bee dwelling upon the mannor, this is good, or *quamdiu ſe bene geſſerit*. 3 E. 3. 15. 3 Aſſ. Pl. (Ant. 214. b. 4 Rep. 3. a.) 14 E. 2. Grant 92. (10 Rep. 42.) Plo. 242. a.

Vaughan 32. 4 Rep. 33. 37 H. 6. 27. (9 Rep. 95.) (Ant. 214. b. 4 Rep. 3. a.) 14 E. 2. Grant. 92. (10 Rep. 42. Plo. 242. a. Vaughan 32. 4 Rep. 33.) 37 H. 6. 27. (9 Rep. 95.)

And ſo by theſe words, *donec, quouſque, uſque ad, tamdiu, ubicunque*. 10 Aſſ. 4. 6 E. 3. 8, 9. 21. 3 E. 3. 18. Annuitie 40.

"*Si l'un de eux devie, &c.*" For if any of them die the coverture is diſſolved, and conſequently the ſtate determined by the limitation. 19 H. 6. 54. Temps E. 1. Annuitie 150. 11 Aſſ. p. 8.

21 Aſſ. p. 18. 26 E. 3. 69. 7 E. 4. 16. 9 E. 4. 25, 26. 9 H. 6. 39. 14 H. 8. 13.

"*Ou que divorce ſoit fait enter eux, &c.*" Here is a diſtinction to be underſtood: for there bee two kinds of divorces, viz. one *à vinculo matrimonii**, and the other *à menſa et thoro*. *Divortium dicitur à divertendo*, or *divortendo, quia vir divertitur ab uxore*. Divorces *à vinculo matrimonii* are theſe: *Cauſâ præcontractûs, cauſâ metûs, cauſâ impotentiæ ſeu frigiditatis, cauſâ affinitatis, cauſâ conſanguinitatis, &c.* And I reade in an ancient record, *coram rege*

* 47 E. 3. 27. 39 E. 3. 32, 33. 11 H. 4. 14. 76. Bracton fo. 298 18 E. 4. 28. 24 H. 8. baſtar 1.

Br. 44. 39 E. 1. baſtard 21. 22 E. 4. tit. Conſultat. 5. 6 E. 3. 249. 35 3.

Termino Paſch. 30 *E.* 1. *William de Chadworthe's* caſe, that he was divorced from his wife, for that he did carnally know her daughter before he married the mother; all which are cauſes of divorce preceding the marriage.

(1 Sid. 64. 1 Roll. Abr. 341. 360. 681.)

A menſâ et thoro, as *cauſâ adulterii*, which diſſolveth not the marriage *à vinculo matrimonii*, for it is ſubſequent to the marriage. And the divorce that *Littleton* here ſpeaketh of is intended of ſuch divorces [*] as diſſolve the marriage *à vinculo matrimonii*, and maketh the iſſue baſtard, becauſe they were not *juſtæ nuptiæ*. And therefore in *Littleton's* caſe though the huſband and wife be divorced *cauſâ adulterii*, yet the freehold continueth, becauſe the coverture continueth. And it is further to be underſtood, that many divorces that were of force by the canon law when *Littleton* wrote, are not at this day in force; for by the ſtatute of 32 *H.* 8. *ca.* 38, it is declared that all perſons be lawfull (that is, may lawfully marry) that be not prohibited by God's law to marry, that is to ſay, that be not prohibited by the Leviticall degrees.

[*] Vid. Sect. 399. (Sid. 13. 118. 5 Rep. 98. 7 Rep. 42. Cro. Car. 463. 2 Inſt. 682. Vaugh. 221. 319. 321.)

32 H. 8. ca. 38.

A man married the daughter of the ſiſter of his firſt wife, and was drawne in queſtion in the eccleſiaſticall court for this marriage, alleging the ſame to be againſt the canons; and it was reſolved [n] by the court of common-pleas, upon conſideration had of the ſaid ſtatute, that the marriage could not be impeached, for that the ſame was declared by the ſaid act of parliament to be good, inaſmuch as it was not prohibited by the Levitical degrees, *et ſic de ſimilibus.* (1)

[n] Tr. 2. Jac. Rot. 1032. Richard Parſons' caſe (Cont. 1 Cro. 228. Acc. Mo. 907. Vid. Sid. 434.)

Sect. 381.

ET que ils ont eſtate pur terme de leur deux vies, probatur ſic: *Cheſcun home que ad eſtate de franktenement en aſcun terres ou tenements, ou il ad eſtate en fee, ou en fee taile, ou pur terme de ſa vie demeſne, ou pur terme d'auter vie, et per tiel leaſe ils ont franktenement, mes ils n'ont per ceſt grant fee, ne fee taile, ne pur terme d'auter vie*, ergo, *ils ont eſtate pur terme de lour vies, mes ceo eſt ſur condition en leſ en le forme avantdit; et en ceſt cas s'ils fieront waſt, le feoffor avera envers eux briefe de waſt ſuppoſant per ſon briefe*, quòd tenet ad terminum vitæ, &c. * *mes en ſon count il declare coment et en quel maner le leas fuit fuit.*

AND that they have an eſtate for term of their two lives is proved thus: Every man that hath an eſtate of freehold in any lands or tenements, either he hath an eſtate in fee, or in fee taile, or for terme of his own life, or for terme of another man's life, and by ſuch a leaſe they have a freehold, but they have not by this grant fee, nor fee taile, nor for terme of another's life, *ergo*, they have an eſtate for terme of their owne lives, but this is upon condition in lawe in forme aforeſaid; and in this caſe if they ſhal do waſt, [235. b.] the feoffor ſhall have a writ of waſte againſt them, ſuppoſing by his writ, *quòd tenet ad terminum vitæ, &c.* but in this count he ſhall declare how and in what maner the leaſe was made.

* *mes—et*, L. and M. and Roh.

(1) [See Note 149.]

k PROBATUR

" *PROBATUR ſic.*" By this argument logically drawne *à diviſione*, it appeareth, how neceſſary it is that our ſtudent ſhould (as *Littleton* did) come from one of the univerſities to the ſtudie of the common law, where he may learne the liberall arts, and eſpecially logick, for that teacheth a man not onely by juſt argument to conclude the matter in queſtion, but to diſcerne betweene truth and falſehood, and to uſe a good method in his ſtudie, and probably to ſpeake to any legall queſtion, and is defined thus, *dialectica eſt ſcientia probabiliter de quocis themate differendi*, whereby it appeareth how neceſſary it is for our ſtudent. Pl. Com. 361. b. Vid. ſect. 345. ſimile.

" *Suppoſant per ſon briefe*, quòd tenet ad terminum vitæ, *&c.*" This and the reſt of this ſection is evident and plaine. 11 H. 6. 27.

Sect. 382.

EN meſme le manner eſt, ſi un abbe fait un leaſe a un home, a aver et tener a luy durant le temps que le leſſor eſt abbe; en ceſt caſe le leſſee ad eſtate pur terme de ſa vie demeſne: mes ceo eſt ſur condition en ley, ſcilicet, *que ſi l'abbe reſigna, ou ſoit depoſe, que bien lirroit a ſon ſucceſſor d'entrer, &c.*

IN the ſame maner it is, if an abbot make a leaſe to a man for yeares, to have and to hold to him during the time that the leſſor is abbot; in this caſe the leſſee hath an eſtate for term of his own life: but this is upon condition in law, *ſcilicet*, That if the abbot reſigne, or be depoſed, that then it ſhall be lawfull for his ſucceſſor to enter, &c.

" *SI un Abbe.*" So it is of a biſhop, archdeacon, and other eccleſiaſticall or temporall body politique or corporate, or of any officer or graduate, or the like. Vid. Bract. lib. 5. 414. (Plo. 242.)

" *Reſigne ou ſoit depoſe.*" And ſo it is of a tranſlation and ceſſion.

Sect. 383.

ITEM home poit veier en le Livre d'Aſſiſe, viz. anno 38 E. 3. ‡ p. 3. *un plea d'Aſſ. en ceſt forme que enſuiſt*: ſcilicet, *Un aſſiſe de* Novel Diſſeiſin *auterfoits fuit port vers* A. *que pleda al aſſiſe, et trove fuit per verdict, que l'aunceſtor le plaintif deviſa ſes tenements a vendre per le defendant, que fuit ſon executor, et de faire diſtribution des deniers pur ſon alme: et fuit trove, que maintenant apres la mort le teſtator, un home luy tendiſt*

ALSO a man may ſee in the Book of Aſſiſes, *an.* 38 *E.* 3. *p.* 3. a plea of Aſſiſe in this form following, *ſcilicet*, An aſſiſe of *Novel Diſſeiſin* was ſometime brought againſt *A.* who pleaded to the aſſiſe, and it was found by verdict, that the anceſtour of the plaintife deviſed his lands to bee ſold by the defendant, who was his executor, and to make diſtribution of the money for his ſoule: and it was found, that preſently

‡ *p.* 3. not in L. and M. nor Roh.

tendiſt certaine ſumme de deniers pur les tenements, mes non pas al value, et que le executor puis avoit tenus les tenements en ſa main demeſne per deux ans, al entent de les vender pluis chier a aſcun auter; et trove fuit que il avoit tout temps priſt les profits de les tenements a ſon uſe demeſne, ſans rien faire pur l'alme le mort, &c. Moubray * *juſtice diſoit, l'executor en tiel caſe eſt tenus per la ley a faire le vender a pluis toſt que il purroit apres la mort ſon teſtator, et trove eſt que il refuſe de faire vendre, & iſſint de avoit un default en luy, et iſſint per force del deviſe il fuiſt tenus d'aver mis touts le profits † avenants de les tenements al uſe le mort, et trove eſt que il ad priſe a ſon uſe demeſne, et iſſint auter default en luy. Per que fuit adjudge, que le plaintife recovera.‡ Et iſſint appiert per le dit judgement, que per force del dit deviſe, l'executor n'avoit eſtate ne poyer en les tenements, forſque ſur condition en ley.*

ſently after the death of the teſtator, one tendred to him a certaine ſum of mony for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two yeares, to the entent to ſell the ſame dearer to ſome other; and it was found that he had all the time taken the profits of the lands to his owne uſe, without doing any thing for the ſoule of the deceaſed, &c. *Moubray* juſtice ſaid, the executor in this caſe is bound by the law to make the ſale as ſoone as he may after the death of his teſtator, and it is found that hee refuſed to make ſale, and ſo there was a default in him, and ſo by force of the deviſe he was bound to put all the profits comming of the lands to the uſe of the dead, and it is found that he tooke them to his owne uſe, and ſo another default in him. Wherefore it was adjudged, that the Pl' ſhould recover. And ſo it appeareth by the ſaid judgement, that by force of the ſaid deviſe the executour had no eſtate nor power in the lands, but upon condition in law.

"LIVRE d'Aſſiſes" is a booke of the Reports of Caſes in the raigne of king *Edward* the Third, and it is called the Booke of *Aſſiſes*, becauſe the greateſt part of the caſes therein are upon writs of *aſſiſes* brought, as hath been ſaid, and which hath beene cited before.

"*Deviſa les tenements a vendre per ſon executor.*" This muſt be intended to be of lands deviſable by cuſtome, for lands by the common law were not deviſable (as hath been ſaid): for [236. a.] in this ſection is implyed a diverſity, *viz.* when a man deviſeth that his executor ſhal ſell the land, there the lands deſcend in the meane time to the heire, and untill the ſale bee made the heire may enter and take the profits. But when the land is deviſed to his executor to be ſold, there the deviſe taketh away the deſcent, and veſteth the ſtate of the land in the executor, and he may enter and take the profits, and make ſale according to the deviſe. And here it appeareth by our author, that when a man deviſeth his tenements to be ſold by his executors, it is all one as if he had deviſed his tenements to his executors to be ſold: and the reaſon is, becauſe he deviſeth the tenements whereby hee breakes the deſcent. (1)

(Latch. 9 Ant. 113. a. 181.)

"*Mowbray,*

* *juſtice diſoit*, not in L. and M. nor Roh. Roh.
† *avenants—prevenantes*, L. and M. and ‡ *&c.* added in L. and M. and Roh.

(1) [See Note 150.]

" *Mowbray.*" *John Mowbray* was a reverend judge of the court of common pleas, and deſcended of a noble family.

" *L'executor en tiel caſe eſt tenus per la ley a faire le vender a pluis toſt que il purroit apres la mort ſon teſtator, &c.*" And the reaſon hereof is, for that the meane profits taken before the ſale ſhall not bee aſſets, ſo as he may be compellable to pay debts with the ſame, and therefore the law will inforce him to ſell the lands as ſoone as he can, for otherwiſe hee ſhall take advantage of his owne laches: but if a man deviſe that his executor ſhall ſell his land, there he may ſell it at any time, for that he hath but a bare power, and no profit. And by this caſe it appeareth what conſtruction the law maketh for the ſpeedy payment of debts. And here is to be obſerved, that many words in a will doe make a condition in law, that make no condition in a deed: As here to deviſe lands to an executor *ad vendendum*, ſo if lands be deviſed to one *ad ſolvendum* 20 *l.* to *I. S.* or paying twentie pounds to *I. N.* this amounts to a condition. And *Crickmer's* caſe was this: A man ſeiſed of certaine lands holden in ſocage had iſſue two daughters *A.* and *B.* and deviſed all his lands to *A.* and her heires, to pay unto *B.* a certaine ſumme of money at a certaine day and place; the money was not paid, and it was adjudged, That theſe words, " to pay," &c. did amount in a will to a condition; and the reaſon was, for that the land was deviſed to *A.* for that purpoſe, otherwiſe *B.* to whom the money was appointed to be paid, ſhould be remedileſſe, *et intereſt reipublicæ ſuprema hominum teſtamenta rata haberi:* and the leſſee of *B.* upon an actuall ejectment recovered the moitie of the land againſt *A.*

(4 Rep. 81. b.)

(3 Cro. 19. 21. a.)

[236. b.]

Mich. 31 & 32 El. in the King's Bench. Crickmer's caſe adjudge. Dy. 6 E. 6. fo. 74. 7 E. 6. 70. (1 Leo. 174.) 10 Rep. 41. Cro. Car. 185.]

" *Et iſſint appiert per le judgement, &c.*" This concluſion upon a judgment is of great authoritie in law, *quia judicium pro veritate accipitur*, and, as it hath beene ſaid, *judicium* is *quaſi juris dictum.*

Sect. 384.

† *ET mults auters choſes et caſes y ſont d'eſtates ſur condition en la ley, et en tiels caſes il ne beſoigne d'aver monſtre aſcun fait, rehearſant la condition, pur ceo que la ley en luy meſme purport le condition, &c.*

Ex paucis dictis intendere plurima poſſis.

Plus ſerra dit de conditions en le ‡*prochein chapter, en le chapter de Releaſes, et en le chapter de Diſcontinuance.*

AND many other things there are of eſtates upon condition in law, and in ſuch caſes hee needed not to have ſhewed any deed, rehearſing the condition, for that the law it ſelfe purporteth the condition, &c.

Ex paucis dictis intendere plurima poſſis.

More ſhall be ſaid of conditions in the next chapter, in the chapter of Releaſes, and in the chapter of Diſcontinuance.

† *Et mults auters choſes et caſes y ſont d'eſtates ſur condition en la ley,* not in L. and M. nor Roh.

‡ *prochein chapter—chapitre de diſcentic que tollent entres,* L. and M. and Roh.

9 E. 4. 36. (5 Rep. 74. 6 Rep. 38.)

HEREBY it appeareth, that limitations (which, as hath beene ſaid, *Littleton* termeth conditions in law) may be pleaded without deed: and the reaſon of our author is obſervable, becauſe the law in itſelfe purporteth the condition, whereof ſomewhat hath bin ſaid before, and therfore looke backe to the conditions in law, or words of limitation, and withall that a ſtranger may take advantage of a limitation, as hath beene ſaid.

(Ant. 214. b.)

Vid. Sect. 220.

Littleton having ſpoken at large of conditions in deed and in law, ſomewhat ſeemeth neceſſary to bee ſaid of defeaſances, whereby the ſtate or right of freehold and inheritance may be defeated and avoyded.

Bract. li. 2. fo. 16, 17 Aſſ. p. 2. 3 E. 3. 42 E. 3. 1. 43 E. 17. 43 Aſſ. 12. 7 H. 6. 43. 8 H. 6. 23. 32 E. 3. Annu. 20. 5 E. 3. Annuity 44. 30 Aſſ. p. 1.

"*Defeaſance*," *Defeiſantia*, is fetched from the French word *defaire*, *i. e.* to defeat or undoe, *infectum reddere quod factum eſt*. There is a diverſitie between inheritances executed, and inheritances executorie; as lands executed by livery, &c. cannot by indenture of defeaſance be defeated afterwards. And ſo if a diſſeiſee releaſe a diſſeiſor, it cannot bee defeated by indentures of defeaſance made afterwards; but at the time of the releaſe or feoffment, &c. the ſame may be defeated by indentures of defeaſance, for it is a maxime in law, *Quæ incontinenti fiunt in eſſe videntur*. (1)

30 Aſſ. p. 11. 31 Aſſ. 32. (Ant. 207. a. 1 Roll. Abr. 590.)

20 Aſſ. pl. 7. 7 E. 4. 29. Browning and Beſton's caſe, Pl. Com. 134. 28 H. 8. Dier 6. 27 H. 8. 15. 19 R. 2. done 10. Albanie's caſe, lib. 1. 107.

But rents, annuities, conditions, warranties, and ſuch like, that be inheritances executorie, may be defeated by defeaſances made, either at that time, or any time after: and ſo the law is of ſtatutes, recognizances, obligations, and other things executorie. [237. a.]

"*Ex paucis dictis intendere plurima poſſis.*"

Verſes at the firſt were invented for the helpe of memorie, and it ſtandeth well with the gravitie of our lawyer to cite them. By this verſe of our author, inferences and concluſions in like caſes are warrantable.

(6 Rep. 39. 3 Rep. Twyne's caſe.) (2) 27 H. 8. cap. 10. (Cro. Car. 472. Hob. 348. 9 Rep. 107. 1 Rep. 173. 175.)

Laſtly, ſomewhat were neceſſarie to be ſpoken concerning clauſes of proviſoes, containing power of revocation, which ſince *Littleton* wrote are crept into voluntarie conveyances, which paſſe by raiſing of uſes, being executed by the (2) ſtatute of 27 *H.* 8, and are become verie frequent, and the inheritance of many depend thereupon. As if a man ſeiſed of lands in fee, and having iſſue divers ſonnes, by deed indented, covenanteth in conſideration of fatherly love, and for the advancement of the blood, or upon any other good conſideration, to ſtand ſeiſed of three acres of land to the uſe of himſelfe for life, and after to the uſe of *Thomas* his eldeſt ſon in taile; and for default of ſuch iſſue, to the uſe of his ſecond ſon in taile, with divers like remainders over; with a proviſo that it ſhall be lawfull for the covenantor at any time during his life to revoke any of the ſaid uſes, &c. this proviſo being coupled with an uſe, is allowed to be good, and not repugnant to the former ſtates. But in caſe of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, ſuch a proviſo were merely repugnant and void.

And

(1) [See Note 151.]

And firſt, in the caſe aforeſaid, if the covenantor, who had an eſtate for life, doe revoke the uſes according to his power, he is ſeiſed againe in fee ſimple without entrie or claime.

Secondly, he may revoke part at one time, and part at another.

Thirdly, If he make a feoffment in fee, or levie a fine, &c. of any part, this doth extinguiſh his power but for that part; whereas in that caſe the whole condition is extinct. But if it be made of the whole, all the power is extinguiſhed; ſo as to ſome purpoſes it is of the nature of a condition, and to other purpoſes in nature of a limitation.

Lib. 1. fol. 173, 174. Digge's caſe, lib. 1. fol. 107. Albanie's caſe, lib. 10 fo. 143. Scrope's caſe, lib. 7. fol. 12, 13. Sir Francis Engleſield's caſe (2 Roll. Abr. 263. 1 Roll. Abr. 331.)

Fourthly, If hee that hath ſuch power of revocation hath no preſent intereſt in the land, nor by the ceaſor of the ſtate ſhall have nothing, then his feoffment or fine, &c. of the land is no extinguiſhment of his power, becauſe it is meere collaterall to the land.

Fiftly, By the ſame conveyance that the old uſes be revoked, may new be created or limited, where the former ceaſe *ipſo facto* by the revocation, without either entrie or claime.

Sixtly, That theſe revocations are favourably interpreted, becauſe many men's inheritances depend on the ſame. (1) And here I may apply the aboveſaid verſe:

Ex paucis dictis intendere plurima poſſis.

(1) [See Note 152.]

Chap. 6. Diſcents que tollent Entries. Sect. 385.

*DISCENTS que tollent entries ſont en deux maners, ceſt aſcavoir, ou diſcent eſt en fee, ou en fee taile. Diſcents en fee que tollent entries * ſont, ſicome home ſeiſie de certaines terres ou tenements eſt per un auter diſſeiſe, & le diſſeiſor ad iſſue et morust de tiel eſtate ſeiſie, ore les tenements deſcendont al iſſue del diſſeiſor per courſe de la ley, come heire a luy. Et pur ceo que la ley mitte les terres ou tenements ſur l'iſſue per force del diſcent, iſſint que l'iſſue vient a les tenements per courſe de ley, et nemy per ſon fait demeſne, l'entrie le diſſeiſee eſt tolle, & il eſt mis de ſuer un briefe* d'entre ſur diſſeiſin *envers le heire le diſſeiſor, de recoverer la terre*†.

DISCENTS which toll entries are in two manners, to wit, where the diſcent is in fee, or in fee taile. Diſcents in fee which toll entries are, as if a man ſeiſed of certaine lands or tenements is by another diſſeiſed, and the diſſeiſor hath iſſue, and dieth of ſuch eſtate ſeiſed, now the lands diſcend to the iſſue of the diſſeiſor by courſe of law, as heire unto him. And becauſe the law caſt the lands or tenements upon the iſſue by force of the diſcent, ſo as the iſſue commeth to the lands by courſe of law, and not by his owne act, the entrie of the diſſeiſee is taken away, and he is put to ſue a writ of *entrie ſur diſſeiſin* againſt the heire of the diſſeiſor, to recover the land.

Mirror, cap. 2. ſect. 5. Bracton, lib. 5. fol. 370. and 434. Britton fol. 115. 215. Vide Sect. 5. (Sid. 198. Ant. 13. b. Ant. 163.)

"*DISCENTS.*" This word commeth of the Latine word *diſcendere, id eſt, ex loco ſuperiore in inferiorem movere;* and in legall underſtanding it is taken when land, &c. after the death of the anceſtor is caſt by courſe of law upon the heire, which the law calleth a diſcent. And this is the nobleſt and worthieſt meanes whereby lands are derived from one to another, becauſe it is wrought and veſted by the act of law, and right of blood, unto the worthieſt and next of the blood and kindred of the anceſtor, [237. b.] and therefore it hath not in the common law altogether the ſame ſignification that it hath in the civill law; for the civilians call him, *hæredem, qui ex teſtamento ſuccedit in univerſum jus teſtatoris.* But by the common law he is only heire which ſucceedeth by right of blood. And this agreeth well with the etymologie of the word (heire) to whom the lands diſcend, for *hæres dicitur ab hærendo, quia qui hæres eſt hæret, hoc eſt, proximus eſt ſanguine illi cujus eſt hæres.* So as hee that is *hæres, ſanguinis eſt hæres, & herus hereditatis.*

(Ant. 7. b.)

"*Diſcents que tollent entries ſont en deux manners.*" Here is an exact and perfect diviſion made by our author, and yet withall plaine and perſpicuous.

Now, as a diſcent is the worthieſt meanes to come to lands, &c. ſo hath the heire more privileges than any other that by other order or meanes come to the lands, &c. as ſhall appeare hereafter.

* Bracton lib. 4. fol. 162. & 209. Britton fol. 115. Fleta lib. 4. cap. 2.

Nota, In ancient time * if the diſſeiſor had beene in long poſſeſſion, the diſſeiſee could not have entred upon him. [a] Likewiſe the

[a] 50 E. 3. 21. 1 Aſſ. 13. 20 H. 3. Aſſ. 432. 9 Aſſ. 15. 29 Aſſ. 5. 54. 26 Aſſ. 12. 21 Aſſ. 28. 43 Aſſiſe 17.

diſſeiſee

* *ſont—eſt*, L. and M. and Roh. † &c. added in L. and M. and Roh.

diſſeiſee could not have entred upon the feoffee of the diſſeiſor, if he had continued a yeare and a day in quiet poſſeſſion. But the law is changed in both theſe caſes, only the dying ſeiſed being an act in law, doth hold at this day, and this ſeemeth to be verie ancient, for this was the law before the Conqueſt. [b] *Porro autem quam maritus ſine lite et controverſia ſedem incoluerit, eam conjux et proles ſine controverſiâ poſſidento, ſi qua in illum lis fuerit illata viventem, eam hæredes ad ſe (perinde atque is vivus) accipiunto.* [b] Lamb. explicat. fol. 120. 70.

And one of the reaſons of this ancient law may be, that the heire cannot ſuddenly by entendment of law know the true ſtate of his title. And for that many advantages follow the poſſeſſion and tenant, the law taketh away the entrie of him that would not enter upon the anceſtor, who is preſumed to know his title, and driveth him to his action againſt the heire that may be ignorant thereof.

"*Et moruſt de tiel eſtate ſeiſie.*" To a diſcent that taketh away an entrie a dying ſeiſed is neceſſarie, as here it appeareth; but a man to other purpoſes may have lands by diſcent though his anceſtor died not ſeiſed, as hath beene ſaid before. 11 H. 7. 18. 40 E. 3. 24.

"*Des terres ou tenements.*" That is, of ſuch tenements as be corporeall, and doe lye in liverie, and not of inheritances which lye in grant, as advowſons, rents, commons in groſſe, and ſuch like, which bee inheritances incorporeall, and yet are included within this word (tenements). For diſcents of them doe not put him that right hath to an action; and the reaſon of this diverſitie is, for that houſes ſerve for the habitation of men, and lands to be manured for their ſuſtenance, and therefore the heire after a diſcent ſhall not be moleſted or diſturbed in them by entrie. 33 E. 3. gard. 162. 6 H. 4. 4. 39 E. 3. 36. 15 E. 4. 14. F. N. B. 143. q. 7 H. 4. 12. 5. 2 Aſſ. p. 9. 21 E. 3. 2.

"*Eſt pur un auter diſſeiſie.*" The like law is of an abatement or intruſion, and of their feoffees, or donees, &c.

[238. a.] Upon the words of *Littleton* a diverſitie may be collected, that if a recoverie be had by *A.* againſt *B.* and before execution *B.* die ſeiſed, this diſcent ſhall not take away the entrie of the recoverer. But if after execution *B.* had diſſeiſed the recoveror and died ſeiſed, this diſcent ſhall take away the entrie of the recoveror within the expreſſe words of *Littleton*: and ſo it is in caſe of a fine. (8 Rep. 101.) (6 Co. 51. b.) 38 E. 3. tit. 3. Entrie conge 51. 45 E. 3. quare Imp. 139. 27. b. 3. 88. 9 H. 6. 49.

21 H. 6. 17. 3 E. 4. 6. 12 E. 4. 19. 8 H. 7. 3. 6 E. 4. 11. 7 H. 7. 15. 5 H. 7. 21. 10 H. 7. 5. b.

(n) A recoverie is had againſt tenant for life, where the remainder is over in fee, tenant for life dieth, he in remainder entreth before execution, and dieth ſeiſed, the entrie of the recoveror is lawfull, becauſe he is privie in eſtate; otherwiſe it is if the diſcent had beene after execution. (n) 5 H. 7. 2.

A. recovereth an advowſon againſt *B.* in a writ of right, and hath judgement final; the incumbent dieth; *B.* by uſurpation preſents to the church, and his clarke is admitted and inſtituted; *B.* dieth: *A.* is put out of poſſeſſion, and the heire of *B.* is not ſo bound by the judgement either in blood or eſtate but that he ſhall preſent. (o) *B.* levies a fine to *A.* of an advowſon to him and his heires; after the church becomes void; *B.* preſents by uſurpation, and his clarke is admitted and inſtituted: this ſhall put *A.* the conuſee out of poſſeſſion. And the reaſon of theſe two caſes is, for that at the common law every preſentation to a church did put the rightfull patron 45 E. 3. quare Imp. 139. (o) 8 E. 2. quare Imp. 166. (6 Co. 48.)

patron out of poſſeſſion, and did put him to his writ of right, whether the preſentation were by title or without, and therefore albeit the uſurpation were in both the ſaid caſes before execution, yet it put the rightfull patron out of poſſeſſion. So note a diverſitie betweene a recoverie of land, and of an advowſon.

"*L'entrie le diſſeiſee eſt tolle.*" (1) Here is one of the privileges which the law giveth to the heire by diſcent of houſes and lands.

(p) At the common law if the diſſeiſor, abator, or intrudor had died ſeiſed ſoone after the wrong done, the diſſeiſee and his heires had been barred of his and their entrie without any time limited by law; but now by the ſtatute (q) made ſince *Littleton* wrote, it is enacted, that except ſuch diſſeiſor hath been in the peaceable poſſeſſion of ſuch mannors, lands, &c. whereof he ſhall die ſeiſed by the ſpace of five yeares next after ſuch diſſeiſin, &c. without entrie or continuall claime, &c. that there ſuch dying ſeiſed, &c. ſhall not take away the entrie of ſuch perſon or perſons, &c. But after the five yeares the diſſeiſee muſt take ſuch continuall claime as our author hath taught us, the learning whereof is neceſſarie to be knowne. And it is ſaid that abators and intrudors are out of this ſtatute (2), becauſe the ſtatute is penall, and extends only to a diſſeiſor, and that was the moſt common miſchiefe. *Et ad ea quæ frequentiùs accidunt jura adaptantur.*

(p) L'eſtatute de 32 H. 8. cap. 33. Vide Sect. 422. 426.

(q) 37 H. 6. 1.

Pl. Com. 47. in Wimbeſhe's caſe.

The feoffee of a diſſeiſor is out of the ſaid ſtatute, and remaines as at the common law. But to a diſſeiſor, the ſtatute is taken favourably for advancement of the ancient right; for whether the diſſeiſin be without force, or with force, it is within the ſtatute. And albeit the ſtatute ſpeake of him that at the time of ſuch diſcent had title of entrie, &c. or his heires, yet the ſucceſſors of bodies politique or corporate, ſo you hold yourſelfe to a diſſeiſin, are within the remedie of this ſtatute, for the ſtatute extendeth cleerely to the predeceſſor, being diſſeiſed; and conſequently without naming of his ſucceſſor extendeth to him, for he is the perſon that at the time of ſuch diſcent had title of entrie.

(11 Co. 46. Mo. 151.) Mich. 4 & 5 Eliz. Dier 219. acc.

(Poſt. 246. a.)

But if a man make a leaſe for life, and the leſſee for life is diſſeiſed, and the diſſeiſor die ſeiſed within five yeeres, the leſſee for life may enter; but if he die before he doth enter, it is ſaid that the entrie of him in the reverſion is not lawfull, becauſe his entrie was not lawfull upon the diſſeiſor at the time of the diſcent, as the ſtatute ſpeaketh. But if leſſee for life had died firſt, and then the diſſeiſor had died ſeiſed, he in the reverſion had beene within the remedie of the ſtatute, becauſe he had title of entrie at the time of the diſcent, as the ſtatute ſpeaketh, and ſo within the expreſſe letter of the ſtatute, albeit the diſſeiſin was not immediate to him, and the like is to be ſaid of a remainder, &c.

Vide Pl. Com. 47. ubi ſupra.

F. N. B. 191.

"*Briefe d'entrie ſur diſſeiſin*, Breve de ingreſſu ſuper diſſeiſinam." Of this writ ſomewhat ſhall be ſaid in the next ſection.

(1) [See Note 153.] (2) [See Note 154.]

Sect.

Sect. 386.

DISCENTS en taile que tollent entries ſont, ſicome home eſt diſſeiſie, et le diſſeiſor dona meſme la terre a un auter en le taile, et le tenant en le taile ad iſſue et moruſt de tiel eſtate ſeiſie, et l'iſſue enter; en ceſt caſe l'enter le diſſeiſee eſt tolle, et il eſt mis de ſuer envers l'iſſue de le tenant en taile un briefe* d'entre ſur diſſeiſin †.

DISCENTS in tayle which take away entries are, as if a man bee diſſeiſed, and the diſſeiſor giveth the ſame land to another in taile, and the tenant in taile hath iſſue and dieth of ſuch eſtate ſeiſed, and the iſſue enter; in this caſe the entrie of the diſſeiſee is taken away, and he is put to ſue againſt the iſſue of the tenant in taile a writ of *Entrie ſur diſſeiſin.*

"*MORUST de tiel eſtate ſeiſie.*"

If a diſſeiſor make a gift in tayle, and the donee diſcontinueth in fee, and diſſeiſe the diſcontinuee, and dieth ſeiſed, [238. b.] this diſcent ſhall not take away the entrie of the diſſeiſee, for the diſcent of the fee ſimple is vaniſhed and gone by the remitter; and albeit the iſſue be in by force of the eſtate taile, yet the donee died not ſeiſed of that eſtate, and of neceſſitie there muſt be a dying ſeiſed, as hath beene ſaid, which is a point worthy of obſervation, and implyeth many things.

"*En ceſt caſe l'entrie le diſſeiſee eſt tolle.*"

If a diſſeiſor make a gift in taile, and the donee hath iſſue and dieth ſeiſed, now is the entrie of the diſſeiſee taken away; but if the iſſue die without iſſue, ſo as the eſtate taile which diſcended is ſpent, the entrie of the diſſeiſee is revived, and he may enter upon him in the reverſion or remainder. 9 H. 7. 24. (Poſt. 240.)

So if there be grandfather, father and ſon, and the ſon diſſeiſeth one, and infeoffeth the grandfather who died ſeiſed, and the land diſcendeth to the father, now is the entrie of the diſſeiſee taken away; but if the father dieth ſeiſed, and the land deſcendeth to the ſonne, now is the entrie of the diſſeiſee revived, and he may enter upon the ſon, who ſhall take no advantage of the diſcent, becauſe he did the wrong unto the diſſeiſee. But in the caſe aboveſaid ſome have ſaid, that where after ſuch diſcent to the father, he made a leaſe to the ſon for terme of another man's life, upon whom the diſſeiſee entred, that the ſon brought an aſſiſe and recovered; and the reaſon that hath beene yeelded is, for that the ſon had not the fee ſimple which he gained by diſſeiſin, but is a purchaſer of the free-hold only from the father, and the diſcent remaine not purged. Contrarie it were, as it is there ſaid, if the ſon were heire to the diſcent. But the booke cited there in *Fitzherb. tit.* title *placit.* 6, doth not warrant that caſe, and I hold the law to be contrarie, *viz.* that the diſſeiſee in that caſe ſhall enter upon the diſſeiſor, aſwell as if the father had conveyed the whole fee ſimple to the ſon, for in that caſe alſo the diſcent to the father is not purged. If a diſſeiſor make a leaſe to an infant 13 H. 4. 8, 9. 33 H. 6. 5. b. per Moyle. 34 H. 6. 21. a. per Curiam. Vide Sect. 395. (Ant. 206. b.) 13 E. 3. Br. tit. Entrie Cong 127 (Poſt. 241. a. ſect. 395.)

* *ſont—eſt*, L. and M. and Roh. † *&c.* added in L. and M. and Roh.

infant for life, and he is diſſeiſed, and a diſcent caſt, the infant enters, the entrie of the diſſeiſee is lawfull upon him. More ſhall be ſaid of the like matter in this chapter hereafter in his proper place, *Sect.* 393. 395.

(Sect. 408. F. N. B. 192. d.)

"*Briefe d'entrie ſur diſſeiſin.* Breve de ingreſſu ſuper diſſeiſinam." This writ lieth only upon a diſſeiſin made to the demandant or to ſome of his anceſtors, and of this writ there be foure kindes. The firſt is a writ that lieth for the diſſeiſee againſt the diſſeiſor upon a diſſeiſin done by himſelfe, and this is called a writ of entrie in the nature of an aſſiſe. The ſecond is a writ of *entrie ſur diſſeiſin en le per*, whereof *Littleton* here ſpeaketh, for the heire by diſcent is in the *per* by his anceſtor: ſo it is if the diſſeiſor make a feoffment in fee, a gift in taile, or a leaſe for life, for they are in the *per* by the diſſeiſor. (*) The third is a writ of entrie *ſur diſſeiſin en le per & cui*; as where *A.* being the feoffee of *D.* the diſſeiſor maketh a feoffment over to *B.* there the diſſeiſee ſhall have a writ of entrie *ſur diſſeiſin* of lands, &c. in which *B.* had no entrie but by *A.* to whom *D.* demiſed the ſame, who unjuſtly and without judgement diſſeiſed the demandant. Theſe are called *gradus*, degrees, which are to be obſerved, or elſe the writ is abatable; for *ſicut natura non facit ſaltum, ita nec lex.*

19 H. 6. 56. 9 H. 5. 9. Bracton lib. 5. fol. 219. b. & 318. Brit. fol. 264, 265. Fleta lib. 5. cap. 35. 5 E. 3. 216. (*) 22 E. 3. 1. b. 7 E. 3. 25. F. N. B. 192.

The fourth is a writ of *entrie ſur diſſeiſin in le poſt*, which lieth when after a diſſeiſin the land is removed from hand to hand beyond the degrees; and it is called *in le poſt*, becauſe the words of the writ be, *poſt diſſeiſinam quam D. injuſtè, &c. fecit, &c.* The formes of theſe writs you ſhall read in the *Regiſter* and *F. N. B.* and therefore it were needleſſe to recite them here. So then a degree is of two ſorts; either by act in law, whereof *Littleton* here putteth an example of a diſcent, or by act of the partie, by lawfull conveyance, as is aforeſaid. But it is to be underſtood, that at the common law, if the lands were conveyed out of the degrees, the demandant was driven to his writ of right, in reſpect of ſuch long poſſeſſion in ſo many men's hands, which the law doth ever reſpect and favour. And therefore by the ſtatute [a] of *Marlebridge*, the writ of *entrie in le poſt* is given: *Proviſum eſt etiam quòd ſi alienationes illæ de quibus breve de ingreſſu dari conſuevit, per tot gradus fiant,* [239. a.] *per quot breve illud in formâ priùs uſitata fieri non poſſit habeant conquerentes breve ad recuperandam ſeiſinam ſuam ſine mentione graduum, ad cujuſcunque manus per hujuſmodi alienationes res illa devenerit, per breve originale, & per commune conſilium domini regis inde providendum, &c.* (1)

14 H. 4. 40. (6 Co. 9. b.) [a] Marlebr. cap. 29. 24 E. 3. 70.

Now it is neceſſarie to be knowne, what doth make a degree. Firſt, no eſtate gained by wrong doth make a degree, and therefore neither abatement, intruſion, or diſſeiſin upon diſſeiſin, doth make a degree. Neither doth everie change by lawfull title worke a degree, as if a biſhop or an abbot, or the like, diſſeiſe one and die, where his ſucceſſor is in by lawfull title; for though the parſon be altered, yet the right remaines where it was, *viz.* in the church, and both of them ſeiſed in the ſame right, *viz.* in the right of the church, and therefore in that verie caſe *Bracton* [b] demands the queſtion, *An faciunt gradum de abbate in abbatem ſicut de hærede in hæredem? Et videtur quòd non magis, quàm in computatione deſcenſûs, quia et ſi alternatur perſona,*

Bracton ubi ſupra. Britton ubi ſupra. Fleta ubi ſupra. 4 E. 2. brev. 790. 21 H. 6. 8. (2 Inſt. 155. Stat. Marl. 30. Poſt. Sec. 413.) [b] Bracton lib. 4. fol. 321. 5 E. 3. 83. 5 E. 2. entrie 66. 11 H. 4. 83.

(1) [See Note 155.]

perſona, non propter hoc alternatur dignitas, ſed ſemper manet. And herewith agreeth [c] *Fleta.*

[c] Fleta, lib. 5. cap. 34. 3 H. 3. entrie 11.

Alſo an eſtate made to the king doth make no degree, and therefore if a diſſeiſor by deed inrolled convey the land to the king, and the king by his charter granteth it over, the diſſeiſee cannot have a writ of *entrie in le per & cui*, but in *le poſt*, for the king's charter is ſo high a matter of record as it maketh no degree.

22 E. 3. 7. F. N. B. 191. k. (Poſt. 318. a.) 5 E. 2. entrie 66.

Alſo an eſtate of a tenant by the curteſie, or of the lord by eſcheat, or of an execution of an uſe, by the ſtatute of 27 *H.* 8. or by judgement, or recoverie, or of any others that come in in the *Poſt*, worke no degree. [d] But a tenancie in dower by aſſignement of the heire doth worke a degree, becauſe ſhe is in by her huſband; but aſſignement of dower by a diſſeiſor worketh no degree, but is in the *Poſt*, as hereafter ſhall be ſaid in his proper place.

7 E. 3. 360.

[d] 36 H. 6. dower 30.

When the degrees are paſt, ſo as a writ of entrie in the *Poſt* doth lye, yet by event it may be brought within the degrees againe; as if the diſſeiſor infeoffe *A.* who infeoffes *B.* who infeoffes *C.* or if the diſſeiſor die ſeiſed, and the land diſcend to *A.* and from him to C. now are the degrees paſt; and yet if *C.* infeoffe *A.* or *B.* now it is brought within the degrees againe.

41 E. 3. 4, 5. 39 E. 3. 25. 5 H. 7. 6. 3 H. 6. 38.

If the diſſeiſor make a leaſe for life, the remainder in fee, tenant for life dieth, he in the remainder is in the *Per*, becauſe he now claimeth immediately from the diſſeiſor, and both theſe eſtates make but one degree. (2)

50 E. 3. 27.

Note, there bee divers other writs of entrie beſides this writ of entrie *ſur diſſeiſin*, whereof *Littleton* here ſpeakes; as a writ of entrie *ad terminum qui præteriit, in caſu proviſo, in conſimili caſu, ad communem legem, ſine aſſenſu capituli, dum fuit infra ætatem, dum non fuit compos mentis, cui in vitâ, ſur cui in vitâ, intruſion, ceſſavit*, and the like; and that which hath beene ſaid of one, may be applyed to all.

(F. N. B. 192. a.) (8 Rep. 86.)

Sect. 387.

ET nota, que en tiels diſcents que tollent entries, il covient que home moruſt ſeiſie en ſon demeſne come de fee, ou en ſon demeſne come de fee taile. Car un morant ſeiſie pur terme de vie, ne pur terme d'auter vie, ne unquez tollent entre.*

AND note, that in ſuch diſcents which take away entries, it behoveth that a man die ſeiſed in his demeſne as of fee, or in his demeſne as of fee taile. For a dying ſeiſed for terme of life, or for terme of another man's life, doth never take away an entry.

IF a diſſeiſor make a leaſe to a man and to his heires during the life of *I. S.* and the leſſee dieth, living *I. S.* this ſhall not take away the entrie of the diſſeiſee, becauſe he that died ſeiſed had but a freehold only, and heires in that caſe were added to prevent the occupant, for the heire in that caſe ſhall not have his age, as it was adjudged in [d] Lamb's caſe (3).

Dier 8 El. 253. 7 H. 4. 46. 8 H. 4. 15. 17 E. 3. 48. 11 H. 4. 42. (1 Rep. 140. b.)

[d] Paſch. 16 Eliz. in communi banco. (Ant. 41. b.) 3 E. 3. tit. Entr. Cong. 58. 9 H. 7. 25. a. F. N. B. 145. m.

But

* *&c.* added in L. and M. and Roh.

(2) [See Note 156.] (3) See Note 4, page 241. a.

But if hee in the reverſion diſſeiſe his tenant for life, and dieth ſeiſed, this diſcent ſhall take away the entrie of the tenant for life (4).

9 H. 7. 25. (Hob. 323.) So it is if there be tenant for life, the remainder in taile, the remainder in fee, and tenant in taile diſſeiſeth the tenant for life and dieth ſeiſed, this ſhall take away the entrie of the tenant for life.

(Poſt. 276. a.) (Plo. 546. a.) But if the king's tenant for life be diſſeiſed, and the diſſeiſor die ſeiſed, this diſcent ſhall not take away the entrie of the leſſee for life, becauſe the diſſeiſor had but a bare eſtate of freehold during the life of the leſſee, and *Littleton* ſaith, that a diſcent of an eſtate for terme of another man's life ſhall not take away an entrie (5).

Temps E. 1. Reliefe 12 Dier 14 Eliz. 308. 40 E. 3. 9. b. (*) 24 E. 3. 47. (8 Rep. 99.)

"*En ſon demeſne come de fee.*" If an infant hee diſſeiſed, and the diſſeiſor die ſeiſed, and after the infant commeth to full age, and the heire of the diſſeiſor die before he entreth, albeit he [239. b.] died not ſeiſed of an actuall ſeiſin (1), but of a ſeiſin in law, yet that dying ſeiſed ſhall take away the entrie of the diſſeiſee. (*) And yet in pleading the ſecond heire ſhall (as hath beene ſaid) make himſelfe heire to the diſſeiſor, and that land ſhall not be recovered in value for the warrantie made of other lands by the firſt heire; but though the firſt heire had but a ſeiſin in law, yet he is within the words of *Littleton*, for he was ſeiſed and died ſeiſed in his demeſne as of fee.

Sect. 388.

ITEM, un diſcent de reverſion, ou de remainder, ne unques tollent entrie. Iſſint que en tiels caſes que tollent entries per force de diſcents, il covient que celuy que moruſt ſeiſie ad fee et franktenement al temps de ſon morant †, ou fee taile et franktenement al temps de ſon morant, ou auterment tiel diſcent ne tolle entre.*

ALSO, a diſcent of a reverſion, or of a remainder, doth not take away an entrie. So as in thoſe caſes which take away entries by force of diſcents, it behoveth that hee dieth ſeiſed of fee and freehold at the time of his deceaſe, or of fee taile and freehold at the time of his death, or otherwiſe ſuch diſcent doth not take away an entrie.

AND therefore if a diſſeiſor make a leaſe for yeares, and die ſeiſed of the reverſion, this diſcent ſhall take away the entrie of the diſſeiſee, becauſe hee died ſeiſed of the fee and franktenement. Like law it is if the land be extended upon a ſtatute, judgement, or recognizance, and ſo it is in caſe of a remainder.

But if he had made a leaſe for life, and die ſeiſed of the reverſion, this diſcent ſhall not take away the entrie of the diſſeiſee, for that though he had the fee, yet he had not the franktenement. (2)

Vide Sect. 392. 393. So it is of a tenant in taile *mutatis mutandis*; and note, the law doth ever give great reſpect to the eſtate of freehold, though it be but for terme of life.

If

* *&c.* added in L. M. and Roh.

† *ou fee taile et franktenement al temps de ſon morant*, not in L. and M. nor Roh.

(4) [See Note 157.] (5) [See Note 158.] (1) [See Note 159.] (2) [See Note 160.]

If a diſſeiſor make a leaſe for terme of his own life, and dieth, this diſcent ſhall not take away the entrie of the diſſeiſee; nor though the fee and franktenement diſcend to the heire of the diſſeiſor, yet the diſſeiſor died not ſeiſed of the fee and franktenement: and *Littleton* ſaith, that unleſſe he hath the fee and franktenement at the time of his deceaſe, ſuch deſcent ſhall not take away the entrie (3).

Sect. 389.

ITEM, come eſt dit de diſcents que diſcendont al iſſue de ceux que moront ſeiſies, &c. meſme la ley eſt lou ils n'ont aſcun iſſue, mes les tenements diſcendont al frere, ſoer, uncle, ou auter coſin de celuy que moruſt ſeiſie‡.

ALSO, as it is ſaid of diſcents which diſcend to the iſſue of them which die ſeiſed, &c. the ſame law is where they have no iſſue, but the lands diſcend to the brother, ſiſter, uncle, or other couſin of him which dieth ſeiſed.

BY this it appeareth, that a diſcent, in the collateral line doth take away an entrie, as well as in the lineall.

"*Moront ſeiſies, &c.*" Here (*&c.*) implieth fee ſimple, or fee taile.

[240. a.]

Sect. 390.

ITEM, ſi ſoit ſeignior et tenant, et le tenant ſoit diſſeiſie, et le diſſeiſor aliena a un auter en fee, et l'alienee devie ſans heire, et le ſeignior enter come en ſon eſcheat: en ceſt caſe le diſſeiſee poit enter ſur le ſeignior, pur ceo que le ſeignior ne vient a la terre per diſcent, mes per voy d'eſcheat.

ALSO, if there bee lord and tenant, and the tenant be diſſeiſed, and the diſſeiſor alien to another in fee, and the alienee die without iſſue, and the lord enter as in his eſcheat: in this caſe the diſſeiſee may enter upon the lord, becauſe the lord commeth not to the land by diſcent, but by way of eſcheat (1).

"*LE diſſeiſee poit enter ſur le ſeignior, &c.*" For albeit the alienee of the diſſeiſor die ſeiſed, and the lord by eſcheat commeth to the land by act in law, yet becauſe the land diſcendeth not to him, the entrie of the diſſeiſee in reſpect of the eſcheat ſhall not be taken away. For a dying ſeiſed, and a diſcent, and not a dying ſeiſed and an eſcheat, doth take away the entrie: for (as hath beene ſaid) the diſcent is the worthier title. But in that caſe, if the lord by eſcheat die ſeiſed, and the land diſcend to his heire, that (F.N.B. 144. a.)

‡ *&c.* added L. and M. and Roh.

(3) [See Note 161.] (1) [See Note 162.]

that diſcent ſhall take away the entrie of the diſſeiſee. So it is if the diſſeiſor die ſeiſed, and the heire of the diſſeiſor dieth without heire, the diſſeiſee cannot enter upon the lord by eſcheat. So as there is a diverſitie as touching the diſcent, when after a diſcent caſt, the iſſue in taile dieth without iſſue, and when after a diſcent caſt, the heire in fee ſimple dieth without heire: for he in the reverſion, or remainder, upon a ſtate taile claimeth in above the ſtate taile, but the lord by eſcheat claimeth in under the heire in fee ſimple.

37 H. 6. 1.
9 H. 7. 24. b.
(Poſt. 364. b.)
(Ant. 238. b.)

Sect. 391.

ITEM, ſi home ſeiſie de certaine terre en fee, ou en fee taile, ſur condition de render certaine rent, ou ſur auter condition, coment que tiel tenant ſeiſie en fee, ou en fee taile, moruſt ſeiſie, uncore ſi le condition ſoit enfreint en lour vies, ou apres lour deceaſe, ceo ne tollera pas l'entrie del feoffor, ou del donor, ou de lour heires, pur ceo que le tenancie eſt charge ove le condition, et l'eſtate del tenant eſt conditionall, en queconque mains que le tenancie vient, &c.

ALSO, if a man be feiſed of certain land in fee, or in fee taile, upon condition to render certain rent, or upon other condition, albeit ſuch tenant ſeiſed in fee, or in fee taile, dieth ſeiſed, yet if the condition bee broken in their lives, or after their deceaſe, this ſhall not take away the entrie of the feoffor or donor, or of their heires, for that the tenancie is charged with the condition, and the ſtate of the tenant is conditionall, in whoſe hands ſoever that the tenancie commeth, &c.

UPON theſe two ſections is to bee obſerved a diverſitie betweene a right, for the which the law giveth a remedie by action, and a title, for the which the law giveth no remedie by action, but by entrie only (2). For example, the feoffee upon condition in this caſe hath a right to the land, and therefore his entrie may be taken away, becauſe hee may recover his right by action; but the feoffor or donor that hath but a condition, his title of entrie cannot be taken away by any diſcent, becauſe he hath no remedie by action to recover the land, and therefore if a diſcent ſhould take away his entrie, it ſhould barre him for ever. And the law is all one whether the diſcent were before the condition broken, or after.

Alſo hee that hath a title to enter upon a mortmaine ſhall not he barred by a diſcent, becauſe then he ſhould bee without all remedie. And ſo it is in caſe where a woman hath a title to enter *cauſâ matrimonii prælocuti*, no deſcent ſhall take away her entrie, becauſe ſhe hath but a title, and no remedie by action (1). [240. b.]

33 Aſſ. 11. 24.
21 H. 6. 17.
38 Aſſ. 11. 24.
(Ant. 205.)
Brook tit. Mortmaine 6.
47 E. 3. 11.
21 E. 3. 17.
40 Aſſ. 13.

(2) [See Note 163.] (1) [See Note 164.]

Sect. 392.

*ITEM, ſi tiel tenant ſur condition ſoit diſſeiſie, et le diſſeiſor devie ent ſeiſie, et la terre deſcendiſt al heire le diſſeiſor, ore le entrie le tenant ſur condition, que fuiſt diſſeiſie, eſt toll. Mes uncore ſi le condition ſoit en freint *, donque poit le feoffor ou le donor que fierent eſtate ſur condition, ou lour heirs, enter,* cauſâ quâ ſuprà.

ALSO, if ſuch tenant upon condition be diſſeiſed, and the diſſeiſor die therof ſeiſed, and the land diſcend to the heire of the diſſeiſor, now the entrie of the tenant upon condition, who was diſſeiſed, is taken away. Yet if the condition be broken, the feoffor or the donor which made the eſtate upon condition, or their heires, may enter, *cauſâ quâ ſuprà.*

IF a man be ſeiſed of lands in fee, and by his laſt will in writing deviſeth the ſame to another in fee, and dieth, after whoſe deceaſe the freehold in law is caſt upon the deviſee, and the heire, before any entrie made by the deviſee, entreth, and dieth ſeiſed, this diſcent ſhall not take away the entrie of the deviſee; for if the diſcent, which is an act in law, ſhould take away his entrie, the law ſhould barre him of his right, and leave him utterly without remedie (2). And ſo it is of him that entreth for conſent to a raviſhment; and ſo it was reſolved in the caſe of *Martin Trotte* of London [n] *Paſche* 32 *El. in Com. Banco;* and accordingly was the opinion of the court of common pleas, [o] *Paſche* 1 *Jac. Reg.* To this may be added as a like caſe, the king's patentee before he enter, &c. Another reaſon wherefore a diſcent ſhall not take away the entrie of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the ſame eſſence that it was in at the time of the creation of it, and cannot be diveſted or put out of poſſeſſion, as lands and tenements may (3).

[n] Paſch. 32 Eliz. in Communi Banco. 7 R. 2. Scir. Fac. 3. 44 E. 3. 14. per Finchden.

[o] Paſch. 1 Jac. Regis in Communi Banco.

Sect. 393.

ITEM, ſi un diſſeiſor devie ſeiſie, &c. et ſon heire enter, &c. lequel endowa la feme le diſſeiſor de la tierce part de les tenements, &c. en ceſt cas quant a ceſt tierce part que eſt aſſigne a la feme en dower, maintenant apres ceo que la feme enter, et ad le poſſeſſion de meſme la tierce part, le diſſeiſee poit loyalment enter ſur la poſſeſſion le feme en meſme la tierce part. Et

ALSO, if a diſſeiſor die ſeiſed, &c. and his heire enter, &c. who endoweth the wife of the diſſeiſor of the third part of the land, &c. in this caſe as to this part which is aſſigned to the wife in dower, preſently after the wife entreth, and hath the poſſeſſion of the ſame third part, the diſſeiſee may lawfully enter upon the poſſeſſion of the wife into the ſame third part.

* &c. added in L. and M. but not in Roh.

(2) [See Note 165.] (3) [See Note 166.]

Et la cauſe eſt, pur ceo que quant la feme ad ſon dower, el ſerra adjudge eins immediate per ſon baron, et nemy per l'heire; et iſſint quant a le franktenement de meſme la tierce part, le diſcent eſt defeate. Et iſſint poies veir, que devant le endowment le diſſeiſee ne poit enter en aſcun part, &c. et apres le dowment il poit enter †ſur la feme, &c. mes uncore il ne poit enter ſur les autres deux parts que l'heire le diſſeiſor ad per le diſcent ‡.*

part. And the reaſon is, for that when the wife hath her dower, ſhe ſhall be adjudged in immediately by her huſband, & not by the heire (1); and ſo as to the freehold of the ſame third part, the diſcent is defeated. And ſo you may ſee, that before the endowment the diſſeiſee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet hee cannot enter upon the other two parts which the heire of the diſſeiſor hath by the diſcent (2).

"*DEVIE ſeiſie, &c.*" viz. in fee ſimple or in fee tayle.

"*Et ſon heire enter, &c.*" So as he hath an actuall fee ſimple.

¶ *De la 3. part de les tenements, &c.*" id eſt, in ſeveraltie.

By this ſection it appeareth, that an entrie being taken away by the diſcent, is revived by the endowment, albeit the tenant in dower ſhall have it but for her life. And the cauſe is, for that although the heire entred, yet when the wife is endowed ſhe [241. a.] ſhall not be in by the heire, [a] but immediately by her huſband being the diſſeiſor, who is in for her life by a title paramount the dying ſeiſed and diſcent, and therefore in judgement of law, the diſcent as to the freehold, and the poſſeſſion which the heire had is taken away by the endowment; for that the law adjudgeth no meane ſeiſin betweene the huſband and the wife.

[a] 8 E. 2. Entrie 75. 19 E. 2. Dower 171. 5 E. 2. Entrie 66. 24 E. 3. 32. 40. 38 Aſſ. Pl. 26. 43 E. 3. 32. 45 E. 3. 9. b. 11 H. 4. 11. 7 H. 5. 3. 10 E. 3. 27, 28. 36 H. 6. Dower 30.

31 E. 1. Meſne 55. (F. N. B. 136.)

If there bee lord, meſne and tenant, the meſne doth grant to the tenant to acquite him againſt the lord and his heires, the lord dies, his wife hath the ſeigniorie aſſigned to her for her dower, and diſtraines the tenant; albeit the grant was to acquite him againſt the lord and his heires only, yet becauſe ſhee continued the eſtate of her huſband, and the reverſion remained in the heire, this grant of acquit all did extend to the wife, which is a notable caſe.

If after the dying ſeiſed of the diſſeiſor, the diſſeiſee abate, againſt whom the wife of the diſſeiſor recover by confeſſion in a writ of dower, in that caſe, though the diſcent bee avoided as *Littleton* here ſaith, yet the diſſeiſee ſhall not enter upon the tenant in dower, becauſe the recoverie was againſt himſelfe; but if he had aſſigned dower to her *in pais*, ſome ſay he ſhould enter upon her (3).

10 E. 3. 26. (7 Rep. 9. a.)

A man makes a gift in tayle reſerving twentie ſhillings rent, and dies, the donee takes wife, and dieth without iſſue, the heire of the donor entreth and endoweth the wife, ſhee is ſo in of the eſtate of her huſband, that albeit the eſtate taile be ſpent, and the rent reſerved thereupon determined, yet after ſhe be endowed, ſhe ſhall be attendant

* *&c* added in L. and M. and Roh.
† *ſur la feme*, not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.

(1) [See Note 167.]
(2) [See Note 168.]
(3) [See Note 169.]

attendant to the heire in reſpect of the ſaid rent. And ſo it is of lord and tenant, the wife that is endowed ſhall be attendant for the due ſervices; but if any ſervices be encroached, albeit that encroachment ſhall binde the heire, yet the wife ſhall be contributorie but for the ſervices of right due (4).

" *Iſſint poies veir, que devant le dowment le diſſeiſee ne poit enter, et apres l'endowment il poit enter, &c.*" The like hath beene ſaid before in this chapter, *Sect.* 386, where the entrie of the diſſeiſee may be taken away for a time, and by matter *ex poſt facto* revived againe.

Nota, albeit the diſſeiſor after a diſcent taketh to him but an eſtate for life, yet when the diſſeiſee doth enter upon him, he ſhall thereby deveſt the reverſion, for the eſtate of freehold is that whereupon a *præcipe* doth lye, and therefore the entrie of the diſſeiſee is as available in law, as if he had recovered it in a *præcipe*. And ſo it is if a diſſeiſor make a leaſe for life, and grant the reverſion to the king, the entrie of the diſſeiſee upon the tenant for life ſhall deveſt the reverſion out of the king in the ſame manner as if the diſſeiſee had recovered the lands againſt the tenant for life in a *præcipe*.

Vide Sect. 393. 388. 25 E. 3. 46. Pl. Com. 553. (Poſt. 354. b. Dyer 31. b.) (1 Roll. Abr. 658. Ant. 55. b.)

[241. b.]

Sect. 394.

*ITEM, ſi un feme ſoit ſeiſie de terre en fee, dont jeo aye droit et title d'entre, ſi la feme prent baron, et ont iſſue enter eux, et puis la feme devie ſeiſie, et apres le baron devie, et l'iſſue enter, &c. en ceſt caſe jeo * poy enter ſur le poſſeſſion l'iſſue, pur ceo que l'iſſue ne vient a ſes tenements immediate per diſcent apres la mort ſa mere, &c. † eins per le mort del pier* (1).

ALSO, if a woman be ſeiſed of land in fee, whereof I have right and title to enter, if the woman take huſband and have iſſue betweene them, and after the wife die ſeiſed, and after the huſband die, and the iſſue enter, &c. in this caſe I may enter upon the poſſeſſion of the iſſue, for that the iſſue comes not to the lands immediately by diſcent after the death of the mother, &c. but by the death of the father.

Contrarium tenetur P. 9 Hen. 7. *per tout le court, &* M. 37 H. 6.

Contrarium tenetur P. 9 H. 7. per tout le court, & M. 37 H. 6.

" *EN ceſt caſe jeo poy enter ſur le poſſeſſion l'iſſue, &c.*" For here was but a diſcent of a reverſion at the time of the dying ſeiſed, for the eſtate of the tenant by the courteſie had commencement by the having of iſſue, and is conſummate by the death of the wife, ſo as the fee and franktenement did not after the deceaſe of the wife deſcend to the heire, and albeit the tenant by the courteſie dieth afterwards, and that the franktenement is caſt upon the heire, ſo as now he hath the fee and franktenement by diſcent, yet becauſe the

Vide 9 H. 7. 24. and 37 H. 6. 1. See before the chapter of Homage. (3 Rep. 34. a.)

* *poy* not in L. and M. and Roh.

† *eins per le mort del pier*, and the note that follows, not in L. and M. nor Roh.

(4) [See Note 170.] (1) [See Note 171.]

the heire came not to the fee and franktenement at once, immediately after the deceaſe of the wife, ſuch a mediate diſcent ſhall not take away the entrie of the diſſeiſee. On the other ſide, an immediate diſcent may take away an entrie for a time, and mediately may be avoided by matter *ex poſt facto*, as hath beene ſaid. But if a dying ſeiſed taketh not away the entrie of him that right hath at the time of the diſcent, it ſhall not by any matter *ex poſt facto* take away his entrie.

If a diſſeiſor die without heire, his wife privement enſeint with an iſſue, and after the iſſue is borne, who entreth into the land, he hath the land by diſcent, and yet thereby the entrie of the diſſeiſee ſhall not be taken away, becauſe, as *Littleton* here ſaith, the iſſue commeth not to the lands immediately by diſcent, after the deceaſe of the father.

And ſo it is if a diſſeiſor make a gift in taile, the remainder in fee, and the donee dieth without iſſue, leaving his wife privement enſeint with a ſonne, and he in the remainder enters, and after the ſonne is borne, who entreth into the land, this diſcent ſhall not take away the entrie of the diſſeiſee, *cauſâ quâ ſuprà*.

"*Contrarium tenetur, &c.*" This is an addition, and therefore to be paſſed over. And at this day, this caſe of *Littleton* is holden for cleere law.

(Ant. 238. b.)

Sect. 395.

ITEM, ſi un diſſeiſor enfeoffa ſon pier en fee, et le pier morust de tiel eſtate ſeiſie, per que les tenements diſcendont a le diſſeiſor, ‡ come fits et heire, &c. en ceſt caſe le diſſeiſee bien poit enter ſur le diſſeiſor, nient obſtant le diſcent, pur ceo que quant al diſſeiſin, le diſſeiſor ſerra adjudge eins forſque come diſſeiſor, nient obſtant le diſcent, ‖ quia particeps criminis.

ALSO, if a diſſeiſor enfeoffe his father in fee, and the father die, ſeiſed of ſuch eſtate, by which the land deſcend to the diſſeiſor, as ſonne and heire, &c. in this caſe the diſſeiſee may well enter upon the diſſeiſor, notwithſtanding the diſcent, for that as to the diſ- [242. a.] ſeiſin, the diſſeiſor ſhall bee adjudged in but as a diſſeiſor, notwithſtanding the diſcent, *quia particeps criminis* (1).

15 E. 4. 23. a.
11 E. 4. 2.
18 E. 4. 25. a.
33 H. 6. 5. b.
34 H. 6. 11.
12 H. 8. 9.
24 H. 8. 3. 9.
16 H. 8. 5.
5 H. 7.
29 Aſſ. 54.

OF this ſufficient hath beene ſaid before in this chapter, Sect. 386. And regularly it is true, that albeit a diſcent be caſt, and the entrie of the diſſeiſee taken away, yet if the diſſeiſor commeth to the land againe, either by diſcent, or purchaſe of any eſtate or freehold, which is implyed in the (&c.) the diſſeiſee may enter upon him, or have his aſſiſe againſt him, as if no diſcent or meane conveyance had beene, *quia particeps criminis*.

39 E. 3. 25, 26. (Poſt. Sect. 409.)

‡ *ent* added in L. and M. ‖ *&c.* added: *quia particeps criminis*, not in L. and M.

(1) [See Note 172.]

Sect.

Sect. 396.

ITEM, ſi home ſeiſie de certaine terre en fee ad iſſue deux fits, et moruſt ſeiſie, et le puiſne fits entra per abatement en la terre, quel ad iſſue, et de ceo moruſt ſeiſie, et les tenements diſcendont al iſſue, et l'iſſue entra en la terre: en ceſt caſe le fits eigne, ou ſon heire, poit enter per la ley ſur l'iſſue del fits puiſne, nient contrieant le diſcent, pur ceo que quant le fits puiſne abatiſt en la terre, apres le mort ſon pier devant aſcun entrie per le fits eigne † fait, la ley intendra que il entra en claymant come heyre a ſon pier. Et pur ceo que l'eigne fits clayma per meſme le title, ceſt aſcavoir, come heyre a ſon pier, il et ſes heires poient enter ſur l'iſſue de puiſne ‡ fits, nient obſtant le diſcent, &c. pur ceo que ils claymont per un meſme title. Et en meſme le maner il ſerra, ſi fueront pluſors diſcents de un iſſue a un auter iſſue del puiſne fits.

ALSO, if a man ſeiſed of certaine land in fee have iſſue two ſons, and die ſeiſed, and the younger ſonne enter by abatement into the land, and hath iſſue, and dieth ſeiſed thereof, and the land deſcend to his iſſue, and the iſſue enters into the land: in this caſe the eldeſt ſonne, or his heire, may enter by the law upon the iſſue of the younger ſon, notwithſtanding the diſcent, becauſe that when the younger ſon abated into the land after the death of his father, before any entrie made by the eldeſt ſonne, the law intend that hee entred claiming as heire to his father. And for that the eldeſt ſonne claimes by the ſame title, that is to ſay, as heire to his father, hee and his heires may enter upon the iſſue of the younger ſon, notwithſtanding the diſcent, &c. becauſe they claime by the ſame title. And in the ſame manner it ſhall be, if there were more diſcents from one iſſue to another iſſue of the younger ſonne (1).

Sect. 397.

MES en tiel caſe, ſi le pier fuit ſeiſie de certaine terres en fee, et ad iſſue deux fits, et devie, et l'eigne ‖ fits enter, et eſt ſeiſie, &c. et puis le puiſne frere luy diſſeiſiſt, per quel diſſeiſin il eſt ſeiſie en fee, et ad iſſue, et de tiel eſtate moruſt ſeiſie, donques l'eigne frere ne poit enter, mes eſt mis a ſon briefe d'entre ſur diſſeiſin, &c. § *de recoverer la terre. Et la cauſe eſt, pur ceo que le puiſne frere vient a les tenements per tortious diſſeiſin fait a ſon eigne frere, et per el tort la ley ne poit*

BUT in this caſe, if the father were ſeiſed of certaine lands in fee, and hath iſſue two ſons, and die, and the eldeſt ſonne enter, and is ſeiſed, &c. and after the younger brother diſſeiſeth him, by which diſſeiſin he is ſeiſed in fee, and hath iſſue, and of this eſtate dieth ſeiſed, then the elder brother cannot enter, but is put to his writ of *entrie ſur diſſeiſin, &c.* to recover the land. And the cauſe is, for that the youngeſt brother commeth to the lands by wrongful

† *fait* not in L. and M.
‡ *fits—frere*, L. and M. and Roh.
‖ *fits—frere*, L. and M. and Roh.
§ *&c.* not in L. and M. nor Roh.

(1) [See Note 273.]

poit entender que il claime come heire a ſon pier, nient pluis que un eſtrange perſon que uſt diſſeiſie l'eigne frere ‡ *que n'avoit aſcun title, &c. Et iſſint poyes veier la diverſitie, lou le puiſne frere enter apres le mort le pier devant aſcun entrie fait per l'eigne frere en tiel cas,* ‖ *et ou l'eigne frere enter apres la mort ſon pier, et puis eſt diſſeiſie per le puiſne frere, lou le puiſne frere puis moruſt ſeiſie* §.

wrongful diſſeiſin done to his elder brother, and for this wrong the law cannot intend that he claimeth as heire to his father, no more than if a ſtranger had diſſeiſed the elder brother which had no title, &c. And ſo you may ſee the diverſitie, where the younger brother entreth after the death of the father before any entrie made by the elder brother in this caſe, and where the elder brother enters after the death of his father, and after is diſſeiſed by the younger brother, where the younger after dieth ſeiſed.

(Plow. 306. a,) "*EN ceſt caſe le fits eigne, &c. poit entrer ſur l'iſſue del fits puiſne, &c.*" And the reaſon hereof is, for that the law intendeth the youngeſt ſonne entred claiming the land as heire to his father, and becauſe the eldeſt ſonne claimeth alſo by the ſame title, viz. as heire to his father, therefore hee and his heires may enter upon the ſecond ſonne and his heires, in reſpect of the privitie of the bloud betweene them, and of the ſame claime by one title, albeit the youngeſt ſon gained a fee ſimple by his entrie: for *Littleton* here calleth it an abatement, which proveth the gaining of a fee ſimple.

Bract. lib. 4. fol. 261. 282, 283. Britton fol. 180, 181. Fleta lib. 5. cap. 1. 2. &c. 20 E. 3. Darr. preſent. 13. 12 H. 3. Mord. pl. ultim. 15 E. 1. Mord. 47. 29 Aſſ. 11. F. N. B. 196. b. (8 Rep. 42.) (Poſt. 271. a.)

And it is to be obſerved, that *aſſiſa mortis anteceſſoris non tenet inter conjunctas perſonas ſicut fratres & ſorores, &c.* for theſe are privie in bloud, but it lyeth againſt ſtrangers, and then damages are to be recovered againſt a ſtranger, but not againſt his brother.

Paſch. 3. E. 3. Coram Rege Banc. in Theſaur. 8 E. 2. Aſſ. 380. 40 E. 3. 24. b. 19. Aſſ. 24. Vid. Brooke tit. Entrie 27. (Roll. Abr. 628, 629.) (4 Rep. 58.)

Lands were given to the huſband and wife, and to the heires of their two bodies, they had iſſue a daughter, the wife died, the huſband had iſſue by another wife foure ſons and died, the eldeſt ſonne abated and died ſeiſed, this diſcent did take away the entrie of the daughters, becauſe they claimed not by one title. And [242. b.] in ancient bookes the eldeſt ſonne is called *hæres propinquus*, and the younger ſonne *hæres remotus*. And albeit the eldeſt ſonne hath iſſue and dieth, and that after his deceaſe the youngeſt ſon or his heire entreth, and many diſcents be caſt in his line, yet may the heires of the eldeſt ſonne enter in reſpect of the privitie of the bloud, and of the ſame claime by one title; but if the youngeſt ſonne make a feoffment in fee, and the feoffee die ſeiſed, that diſcent ſhall take away the entrie of the eldeſt, in reſpect that the privitie of the bloud faileth. And admit that the youngeſt ſonne be of the halfe bloud to his brother, yet he is of the whole bloud to his father; and therefore if he entreth by abatement, and dieth ſeiſed, it ſhall not barre his elder brother of his entrie. But if the eldeſt ſonne entreth, and gaineth an actuall poſſeſſion and ſeiſin, then the entrie of the youngeſt is a diſſeiſin. And then a dying ſeiſed ſhall take away the entrie of the eldeſt, for *poſſeſſio terræ* muſt be *vacua* when the youngeſt ſonne enters

‡ *frere*, not in L. and M. nor Roh.
‖ *&c.* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.

enters by abatement, as *Littleton* ſaith, becauſe he hath more colour in that caſe to claime, as heire to his father, who laſt was actually ſeiſed. Therefore if after the deceaſe of the father, an eſtranger doth firſt enter and abate, upon whom the youngeſt ſonne entreth and diſſeiſe him, and die ſeiſed, this diſcent ſhall binde the eldeſt, for his entred by diſſeiſin, and not by abatement.

[243. a.] If a man bee ſeiſed of lands of the nature of burgh Engliſh, and hath iſſue two ſonnes and die, and the eldeſt ſonne before any entrie made by the youngeſt, entreth into the land by abatement, and dieth ſeiſed, this ſhall not take away the entrie of the youngeſt brother. *Et ſic de ſimilibus.* And theſe and the like caſes are all within the reaſon and rule of our author. And where our author ſpeaketh only of an abatement, ſo it is not an intruſion; for if the father make a leaſe for life, and hath iſſue two ſonnes and dieth, and the tenant for life dieth, and the youngeſt ſonne intrude, and die ſeiſed, this diſcent ſhall not take away the entrie of the eldeſt. But if the father hath made a leaſe for yeares it had beene otherwiſe, for that the poſſeſſion of the leſſee for yeares maketh an actuall freehold in the eldeſt ſonne. And it is to obſerved, that the reaſon of *Littleton* in this caſe (for that both the brethren hold by one title) holdeth alſo in many other caſes. (1 Roll. Abr. 629. Ant. 15. a.)

If two coperceners make partition to preſent by turne, and one of them uſurpe in the turne of the other, this uſurpation ſhall not put the other out of poſſeſſion, becauſe they claime by one title. 22 E. 4. 4. (F. N. B. 34. Ant. 186. b.)

If two coperceners be, and they ſeverally preſent to the ordinarie, yet the church is not litigious, becauſe they claime all by one title (1). Doctor & Stud. cap. 30. fol. 117.

If upon a writ of *diem clauſit extremum*, the youngeſt ſonne be found heire, the eldeſt ſon hath no remedy by the common law, becauſe they claimed by one title; but otherwiſe it is if they claime by ſeverall titles, as it appeareth in our bookes (2). But this is now holpen by a ſtatute * made ſince *Littleton* wrote. 12 E. 4. 18.

If two parſons be in debate for tithes, which amount to above the fourth part, and one man is patron of both churches, no *indicavit* doth lye, for that both incumbents claime by one and the ſame patron. *Et ſic de ſimilibus.* * 2 E. 6. cap. 8. 2 H. 7. 12. a. See the Section next following.

And where *Littleton* ſaith, ſeiſed of lands in fee, the ſame law it is if a man bee ſeiſed of lands in taile, and hath iſſue two ſonnes *mutatis mutandis.*

"*Et eſt ſeiſie, &c.*" That is to ſay, actually ſeiſed, either by entrie, as *Littleton* here putteth it, or by poſſeſſion of the leſſee for yeares, or the like. (Poſt. 245. a.)

"*N'avoit aſcun title, &c.*" That is to ſay, any pretence or ſemblance of title, as the younger brother here hath; and in many other caſes there is a great diverſitie holden in our bookes [*o*] where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our bookes. [*o*] 2 E. 2. baſtardie 19. 21 E. 3. 34. 22 Aſſ. 85. 11 E. 3. age 3.

39 E. 3. 26. 17 E. 3. 59. 11 E. 3. Aſſ. 38. 21 H. 6. 14. Vid. Sect. 400. & cap. Garran.

(1) Acc. Dig. p. 1, c. 3.—See 7th Ann. c. 18. (2) [See Note 174.]

Sect.

Sect. 398.

EN meſme le maner eſt, ſi home ſeiſie de certaine terre en fee ad iſſue deux files et devie, l'eigne file ent'e en la terre claymant tout la terre a ſoy, et ent ſolement priſt les profits, et ra iſſue et moruſt ſeiſie, per que ſon iſſue enter, quel iſſue ad iſſue et devie ſeiſie, et le ſecond iſſue enter†, & ſic ultra, uncore le puiſne file ou ſon iſſue, quant a le moitie poit enter ſur quecunque iſſue de l'eigne file, nient obſtant tiel diſcent, pur ceo que ils claimont per un meſme title, &c. Mes en tiel caſe ſi ambideux ſoers avoyant enter apres la mort lour pier, et ent fueront ſeiſies, et puis l'eigne ſoer uſt diſſeiſie la puiſne ſoer de ceo que a luy affiert, et ent fuit ſeiſie en fee, et ad iſſue, et de tiel eſtate moruſt ſeiſie, per que les tenements diſcendont al iſſue del eigne ſoer donque le puiſne ſoer ne ſes heires ne poient enter, &c. cauſâ quâ ſuprà, &c.

IN the ſame manner it is, if a man ſeiſed of certaine land in fee, hath iſſue two daughters and dieth, the eldeſt daughter entreth into the land claiming all to her, and thereof onely taketh the profits, and hath iſſue and dieth ſeiſed, by which her iſſue enter, which iſſue hath iſſue and dieth ſeiſed, and the ſecond iſſue enter, *& ſic ultra*, yet the younger daughter, or her iſſue as to the moitie, may enter upon any iſſue [243. b.] whatſoever of the elder daughter notwithſtanding ſuch diſcent, for that they claime by one ſame title, &c. But in ſuch caſe where both ſiſters have entred after the death of their father, and were thereof ſeized, and after the eldeſt ſiſter had diſſeiſed the younger of her part, and was thereof ſeiſed in fee, and hath iſſue, and of ſuch eſtate dieth ſeiſed, whereby the lands deſcend to the iſſue of the elder ſiſter, then the younger ſiſter nor her heirs cannot enter, &c. *cauſâ quâ ſuprà, &c.*

(Hob. 120. Poſt. 373. b. Ant. 198.)
21 Aſſ. 19.
21 E. 3. 7. 27. 32.
26 Aſſ. 2.
27 Aſſ. 68.
36 Aſſ. p. 1.
43 E. 3. 19.
4 H. 7. 10.
16 H. 7. 4.
(Mo. 60.)
See more of this in the chapter of Warrantie, Sect. 710.
28 Aſſ. 30.
Vide Sect. 710.
(4 Leo. 52. Ant. 174. a.)

"*CLAIMONT tout la terre.*" Here it appeareth, that when the one coparcener doth ſpecially enter, claiming the whole land, and taking the whole profits, that ſhe gaines the one moitie, viz. of her ſiſter by abatement, and yet her dying ſeiſed ſhall not take away the entrie of her ſiſter; whereas when one coparcener enters generally, and taketh the profits, this ſhall be accounted in law the entrie of them both, and no diveſting of the moitie of her ſiſter (1).

If one coparcener enter claiming the whole, and make a feoffment in fee, and take backe an eſtate to her and her heires, and hath iſſue and die ſeiſed, this diſcent ſhall take away the entrie of the other ſiſter, becauſe by the feoffment the privitie of the coparcenarie was deſtroyed.

"*Claimont per un meſme title, &c.*" Of this ſufficient hath beene ſaid in the next precedent Section.

"*Ne poient enter, &c.*" Of this there hath beene alſo ſpoken in the ſame Section.

† *&c.* added L. and M. and Roh. (1) [See Note 175.]

Sect. 399.

ITEM, ſi home eſt ſeiſie de certaine terre en fee, et. ad iſſue deux fits, et l'eigne fits eſt baſtard, et le puiſne frere eſt mulier, et le pier devie, et le baſtard enter enclaimant come heire a ſon pier, et occupia la terre tout ſa vie, ſans aſcun entre fait ſur luy per le mulier, et le baſtard ad iſſue, et moruſt ſeiſie de tiel eſtate en fee, et la terre diſcendiſt a ſon iſſue, et ſon iſſue enter, &c. en ceſt caſe le mulier eſt ſans remedie, car il ne poit enter, ne aver aſcun action pur recoverer la terre, pur ceo que eſt un antient ley en tiel caſe uſe, &c. *

ALSO, if a man be ſeiſed of certain lands in fee, and hath iſſue two ſonnes, and the elder is a baſtard, and the younger *mulier*, and the father die, and the baſtard entreth claiming as heire to his father, and occupieth the land all his life, without any entrie made upon him by the *mulier*, and the baſtard hath iſſue, and dieth ſeiſed of ſuch eſtate in fee, and the land deſcend to his iſſue, and his iſſue entreth, &c. in this caſe the *mulier* is without remedie, for he may not enter, nor have any action to recover the land, becauſe there is an ancient law in this caſe uſed, &c.

"*SEISIE en fee.*" For this holds not in caſe of an eſtate taile. Pl. Com. 57. 39 E. 3. Le darreine caſe.

"*Mulier, ſeu filius mulieratus.*" *Mulier* hath three ſignifications, Firſt, *Sub nomine mulieris continetur quælibet fœmina.* Secondly. *Propriè ſub nomine mulieris, continetur virgo.* Thirdly, *Appellatione mulieris, in legibus Angliæ, continetur uxor. Et ſic filius natus vel filia nata ex juſtâ uxore, appellatur in legibus Angliæ filius mulieratus, ſeu filia mulierata*, a ſonne *mulier*, or a daughter *mulier*. *Sicut baſtardus* (2) *dicitur à Græco verbo Baſſaris, i. e. meretrix, ſeu concubina, quia procreatur ex meretrice ſeu concubinâ.* In Engliſh hee is called baſe borne, and thereupon ſome ſay, that a baſtard is as much to ſay, as one that is a baſe naturall, for *aerd* ſignifieth nature. I read in *Fleta* [*p*] that there bee three kindes of baſtards, *viz. manſer, nothus, & ſpurius*, which are deſcribed in two old verſes: Lib. 8. fol. 101, 102. Sir Rich. Lechford's caſe. (2 Roll. Abr. 584. 586. Doctor & Stud. 68, 69.) Glanvil. lib. 7. cap. 2. Bract. lib. 5. cap. 19. Brit. cap. 70. Vide Sect. 188. [*p*] Flet. lib. 1. cap. 5. Vide Sect. 380. (1 Roll. Abr. 356, 357, 358, 359. 4 Inſt. 36.)

[244. a.]

Manſeribus ſcortum, notho mœchus dedit ortum.
Ut ſeges è ſpicâ, ſic ſpurius eſt ab amicâ. (1)

Cro. Jac. 541. Godb. 281. Palm. 9.

But we terme them all by the name of baſtards that be borne out of lawfull marriage. By the common law [*r*] if the huſband be within the foure ſeas, that is, within the juriſdiction of the king of England, if the wife hath iſſue, no proofe is to be admitted to prove the childe a baſtard, (for in that caſe *filiatio non poteſt probari*) [*r*] Bract. lib. 4. fol. 278, 279. 7 H. 4. 9. 43 E. 3. 19. 41 E. 3. 7. 44 E. 3. 10. 29 Aſſ. 54. 39 E. 3 13.

98 Aſſ. 14. 1 H. 6. 7. 19 H. 6. 17.

* *&c.* not in L. and M. nor Roh.

(2) [See Note 176.] (1) [See Note 177.]

probari) unleſſe the huſband hath an apparent impoſſibilitie of procreation; as if the huſband be but eight yeares old, or under the age of procreation, ſuch iſſue is baſtard, albeit he be borne within marriage (2). [*f*] But if the iſſue be borne within a moneth or a day after mariage, betweene parties of full lawfull age, the childe is legitimate (3).

[*f*] 18 E. 4. 28. (1 Salk. 120.)

"*Diſcendiſt a ſon iſſue.*" For if the baſtard dieth ſeiſed without iſſue, and the lord by eſcheat entreth, this dying ſeiſed ſhall not barre the *mulier*, becauſe there is no diſcent. If the baſtard enter, and the *mulier* dieth, his wife privement enſeint with a ſonne, the baſtard hath iſſue and dieth ſeiſed, the ſonne is borne, his right is bound for ever. But if the baſtard dieth ſeiſed, his wife enſeint with a ſonne, the *mulier* enter, the ſonne is borne, the iſſue of the baſtard is barred: for *Littleton* putteth his caſe, that there muſt not only be a dying ſeiſed, but alſo a diſcent to his iſſue.

(Poſt. 260. 273. 1 Roll. Abr. 624. 8 Rep. 101. b. Ant. 15. a. 7 Rep. 42.)

"*Et ſon iſſue enter, &c.*" And ſo it is to be underſtood, albeit the *mulier*, after the deceaſe of the baſtard, doth enter before the heire of the baſtard; for the diſcent bindeth, and not the entrie of the heire.

Lib. 8. 101, 102. Sir Rich. Lechford's caſe.

"*Le mulier eſt ſans remedie.*" Hereby it appeareth that this diſcent differeth from other diſcents, for this diſcent barreth the right of the *mulier*, whereas other diſcents doe take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying ſeiſed of the baſtard, his iſſue is become lawfull heire. [*a*] It is holden that if the *mulier* bee within age at the time of the dying ſeiſed, that nevertheleſſe ſhee ſhall bee barred, becauſe the iſſue of the baſtard is in judgement of law become lawfull heire, and the law doth preferre legitimation, before the privilege of infancie.

[*a*] 5 E. 2. Diſcent. Br. 49. 31 Aſſ. 18. 22. 33 E. 3. Verdict 48. 36 Aſſ. 2. Pl. Com. Stowel's caſe, 10 E. 3. 2. 13 E. 1. tit. Baſtardie 28. (Poſt. 246. a. 5 Rep. 98.) 14 E. 2. Baſtardie 26.

And the reaſon of this caſe is, for that *Juſtum non eſt aliquem poſt mortem facere baſtardum, qui toto tempore vitæ ſuæ pro legitimo habebatur.* And ſo it ſeemeth to be, that if a man hath iſſue a ſonne being baſtard eigne, and a daughter, and the daughter is married, the father dieth, the ſonne entreth and dieth ſeiſed, this ſhall barre the feme covert. And the diſcent in this caſe of ſervices, rents, reverſions, expectant upon eſtates taile, or for life, whereupon rents are reſerved, &c. ſhall binde the right of the *mulier*, but a diſcent of theſe ſhall not drive them, that right have, to an action.

Sir Rich. Lechford's caſe, ubi ſupra. (Ant. 241.)

So if the baſtard dieth ſeiſed, and his iſſue endoweth the wife of the baſtard, yet is not the entrie of the *mulier* lawfull upon the tenant in dower, for his right was barred by the diſcent.

If the baſtard eigne entreth into the land, and hath iſſue, and entreth into religion, this diſcent ſhall barre the right of the *mulier*.

20 H. 3. Baſtardie, 29. (Poſt. 248.)

"*Ad iſſue deux fits.*" If a man hath iſſue ſuch a baſtard as is aforeſaid, and dieth, and the baſtard entreth and dieth ſeiſed, and the land deſcendeth to his iſſue, the collaterall heire of the father is bound, as well as where there be two ſonnes,

Hill. 18. E. 3. cor. Reg. Rot. 144. Ebor. 17 E. 3. 59 F. tit. Baſtard. 32 Sir Rich. Lechford's caſe, ubi ſupra. See afterwards in the Chapter of Warranties. (Poſt. 368. a.)

And

(2) [See Note 178.]

(3) See Note 1. to page 245. a.

And where our author ſpeaketh of ſonnes, ſo it is if a man hath iſſue two daughters, the eldeſt being a baſtard, and they enter and occupie peaceably as heires; now the law in favour of legitimation ſhall not adjudge the whole poſſeſſion in the *mulier*, (who then had the only right) but in both, ſo as if the baſtard hath iſſue and dieth, her iſſue ſhall inherit.

[244. b] [b] And in the ſame caſe, if both daughters enter and make partition, this partition ſhall binde the *mulier* for ever.

[c] And an aſſiſe of *mort d'anceſter* lieth not betweene the baſtard and the *mulier* in reſpect of the proximitie of bloud.

And the baſtard being impleaded or vouched ſhall have his age.

[b] 2 E. 3. tit. baſtardie 15. 21 E. 3. 34. b. 30 Aſſ. p. 7. Sir Rich. Lechford's caſe, ubi ſup.

[c] Britt. cap. 73. 20 E. 3. Vouch. 129. 11 E. 3. Age 3. 5 H. 7. 2. Sir Rich. Lechford's caſe, ubi ſup. (Ant. 170. b.)

"*Et le baſtard enter come heire a ſon pier.*" If a man hath iſſue baſtard eigne and *mulier puiſne*, and the baſtard in the life of the father hath iſſue and dieth, and then the father dieth ſeiſed, and the ſonne of the baſtard entreth, as heire to his grandfather, and dieth ſeiſed, this diſcent ſhall binde the *mulier*.

"*Pur ceo que eſt antient ley en tiel caſe uſe, &c.*" As hereafter in our Commentarie upon the two next Sections ſhall appeare, by our antient bookes, and the antient ſtatutes of the realme. And here is implyed how neceſſarie it is, after the example of our author, to looke into the antiquities, than which nothing is more venerable, profitable, and pleaſant (1).

Sect. 400.

MES il ad eſtre l'opinion d'aſcuns, que ceo ſerra intendue lou le pier ad un fits baſtard per un feme, et puis eſpouſa meſme la feme, et apres le eſpouſels il ad iſſue per meſme la feme un fits, ou un file mulier, et puis le pier moruſt, &c. ſi tiel baſtard enter, &c. et ad iſſue et devie ſeiſie, &c. donque avera l'iſſue de tiel baſtard le terre cleerement a luy, come avant eſt dit, &c. et nemy aſcun auter baſtard la mere que ne fuit unque eſpouſe a ſon pier. Et ceo ſemble bone et reaſonable opinion: car tiel baſtard née devant eſpouſels celebres perenter ſon pier et ſa mere, per la ley de ſaint eſgliſe eſt mulier, coment que per la ley del terre il eſt baſtard, et iſſint il ad un colour d'entrer come heire a ſon pier, pur ceo que il eſt per un ley mulier, &c. ſcilicet, *per la ley de ſaint eſgliſe. Mes auterment*

BUT it hath beene the opinion of ſome, that this ſhall be intended where the father hath a ſonne baſtard by a woman, and after marrieth the ſame woman, and after the eſpouſels he hath iſſue by the ſame woman a ſon or a daughter, and after the father dieth, &c. if ſuch baſtard entreth, &c. and hath iſſue and die ſeiſed, &c. then ſhall the iſſue of ſuch baſtard have the land cleerely to him, as it is ſaid before, &c. and not any other baſtard of the mother which was never married to his father. And this ſeemeth to be a good and reaſonable opinion: for ſuch a baſtard borne before marriage celebrated betweene his father and his mother, by the law of holy church is *mulier*, albeit by the law of the land he is a baſtard, and ſo he hath a colour

(1) [See Note 179.]

*autermentest de baſtard que n'ad aſcun * maner colour d'entre come heire, entant que il ne poit per nul ley eſtre dit mulier, car tiel baſtard eſt dit en la ley,* quaſi nullius filius, &c.

a colour to enter as heire to his father, for that he is by one law *mulier, ſcilicet,* by law of holy church. But otherwiſe it is of a baſtard which hath no manner of colour to enter as heire, in ſo much as hee can by no law bee ſaid to be *mulier,* for ſuch a baſtard is ſaid in the law to be *quaſi nullius filius, &c.* (2)

"*MES ad eſte l'opinion d'aſcuns, &c.*" And our author here ſaith, that this opinion is good and reaſonable, [245. a.] for that ſuch a baſtard, by the law of holy church (*) is a *mulier.*

* Vid. Britton, fol. 128. b. 166. 203. And the ſtat. of Merton 20 H. 3. cap. 19. confirmeth this opinion. Hill. 18 E. 3. coram rege in Theſaur. Eborum. Bracton lib. 2. fol. 63.

Matrimonium ſubſequens legitimos facit quoad ſacerdotium non quoad ſucceſſionem, propter conſuetudinem regni quòd ſe habet in contrarium. Yet the canon law holdeth them legitimate *quoad ſucceſſionem.* At a parliament holden [*q*] *anno* 20 *H.* 3. for that to certifie upon the king's writ, that the ſonne borne before marriage as a baſtard, was *contra communem formam eccleſiæ, rogaverunt omnes epiſcopi magnates ut conſentirent, quòd nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantùm ad ſucceſſionem hæreditariam, quia eccleſia tales habet pro legitimis: et omnes comites & barones unâ voce reſponderunt, quòd nolunt leges Angliæ mutare, quæ hucuſque uſitatæ ſunt & approbatæ.*

[q] Statut. de Merton. 20 H. 3. cap. 9. Vid. Bract. l. 5. f. 416, 417. 10 Aſſ. Pl. 20.

"*Iſſint que il ad un colour d'entre, &c.*" Here it is to be obſerved, that the law more reſpecteth him that hath a colourable title, though it be not perfect in law, than him that hath no title at all, as hath beene ſaid [*r*] before (1).

[r] Vide Sect. 397. & cap. gar. Sect.

Sect. 401.

MES en le caſe avant dit, lou le baſtard enter apres la mort le pier, et le mulier luy ouſta, et puis le baſtard diſſeiſiſt le mulier, et ad iſſue, et devie ſeiſie, et l'iſſue enter, donque le mulier poit aver brieſe d'entre ſur diſſeiſin *envers l'iſſue del baſtard, et recovera la terre, &c. Et iſſint poies veir le diverſitie lou tiel baſtard continue la poſſeſſion tout ſa vie ſans interruption, et lou le mulier enter et interrupt le poſſeſſion de tiel baſtard, &c.*

BUT in the caſe aforeſaid, where the baſtard enter after the death of the father, and the mulier ouſt him, and after the baſtard diſſeiſe the mulier, and hath iſſue and dieth ſeiſed, and the iſſue enter, then the mulier may have a writ of *entrie ſur diſſeiſin* againſt the iſſue of the baſtard, and ſhall recover the land, &c. And ſo you may ſee a diverſity where ſuch baſtard continues the poſſeſſion all his life without interruption, and where the mulier entreth and interrupts the poſſeſſion of ſuch baſtard, &c.

* *maner* not in L. and M. but in Roh.

(2) [See Note 180.] (1) [See Note 181.]

"*ET*

"*ET le mulier luy ouſta.*" An eſtranger in the name of the *mulier* without his commandement cannot enter upon the baſtard, for that the baſtard may gaine the eſtate and barre the *mulier*. And therefore regularly none ſhall enter but the *mulier*, or ſome other by his commandement. And therefore *Littleton* ſaith (and the *mulier* put him out) no more than in the caſe [a] of the lord *Awdley*: for there an eſtranger of his owne head could not enter iff the name of him that right had to enter within the five yeares to avoid the fine. But in both thoſe caſes, firſt, if the *mulier* agree thereunto before the diſcent of the baſtard; or ſecondly, if he that right hath before the five yeares be paſt do aſſent thereunto, the claime is good, and ſhall avoid the eſtate both of the baſtard and of the conuſee, as it was holden in the lord *Awdley's* caſe, *quia omnis ratihabitio retrotrahitur, & mandato æquiparatur*, and it ſtandeth well with the words of the ſtatute, ſo that they purſue their title, &c. by way of action or entry; and ſo is the booke in [b] 31 *H.* 8. to be intended.

[a] Mich. 38. & 39 Eliz. in the King's Bench upon evidence by the whole court. Vide 31 H. 8. entr. conge. Br. 123.

4 H. 7. cap.

Vide Sect. 394.

[b] 31 H. 8. entr. cong. Br. 123.

But in the caſe of the *baſtard eigne*, which is *Littleton's* caſe, gardein in ſocage, or gardein in chivalrie, may enter, for they are no ſtrangers, as in another place is plainly ſhewed. If an infant make a feoffment in fee, an eſtranger of his owne head cannot enter [c] to the uſe of the infant, for the eſtate is voidable. But where an infant or a man of full age is diſſeiſed, an entrie by a ſtranger of his owne head is good, and veſteth preſently the eſtate in the infant, or other diſſeiſee. So it is if tenant for life make a feoffment in fee, an eſtranger may enter for a forfeiture in the name of him in the reverſion, and thereby the eſtate ſhall be veſted in him, *et ſic de ſimilibus.*

[c] Paſc. 39 Eliz. in communi banco per curiam. 10 H. 7. 16. 7 E. 3. 69. 26 E. 3. 62. per Thorp. 45 E. 3. releaſe 28. 11 Aſſ. 21.

[245. b.] "*Lou tiel baſtard continue tiel poſſeſſion ſans interruption.*" If the *mulier* entreth upon the baſtard, and the baſtard recovereth the land in an aſſiſe againſt the *mulier*, now is the interruption avoided; and if the baſtard dieth ſeiſed, this ſhall barre the *mulier*.

If the baſtard eigne after the deceaſe of the father entreth, and the king ſeiſeth the land for ſome contempt ſuppoſed to be committed by the baſtard, for which no freehold or inheritance is loſt, but only the profits of the land by way of ſeiſure, and the baſtard die, and his iſſue is upon his petition reſtored to the poſſeſſion, for that the ſeiſure was without cauſe, the *mulier* is barred for ever; for the poſſeſſion of the king when he hath no cauſe of ſeiſure ſhall be adjudged the poſſeſſion of him for whoſe cauſe he ſeiſed. But if after the death of the father the *mulier* be found herre and within age, and the king ſeiſeth, in that caſe the poſſeſſion of the king is in right of the *mulier*, and veſteth the actual poſſeſſion in the *mulier*, and conſequently the baſtard eigne is fore-cloſed of any right for ever.

2 Aſſ. 9.

And ſo it is when the king ſeiſeth for a contempt, or other offence of the father, or of any other anceſtor; in that caſe if the iſſue of the baſtard eigne upon a petition be reſtored, for that the ſeiſure was without cauſe, the *mulier* is not barred, for the baſtard could never enter, and conſequently could gain no eſtate in the land, but the poſſeſſion of the king in that caſe ſhall be adjudged in the right of the *mulier*. And it is to be obſerved, that the baſtard muſt enter *in vacuam poſſeſſionem*, and continue during his life, without interruption made by the *mulier*.

the heire came not to the fee and franktenement at once, immediately after the deceaſe of the wife, ſuch a mediate diſcent ſhall not take away the entrie of the diſſeiſee. On the other ſide, an immediate diſcent may take away an entrie for a time, and mediately may be avoided by matter *ex poſt facto*, as hath beene ſaid. But if a dying ſeiſed taketh not away the entrie of him that right hath at the time of the diſcent, it ſhall not by any matter *ex poſt facto* take away his entrie.

If a diſſeiſor die without heire, his wife privement enſeint with an iſſue, and after the iſſue is borne, who entreth into the land, he hath the land by diſcent, and yet thereby the entrie of the diſſeiſee ſhall not be taken away, becauſe, as *Littleton* here ſaith, the iſſue commeth not to the lands immediately by diſcent, after the deceaſe of the father.

And ſo it is if a diſſeiſor make a gift in taile, the remainder in fee, and the donee dieth without iſſue, leaving his wife privement enſeint with a ſonne, and he in the remainder enters, and after the ſonne is borne, who entreth into the land, this diſcent ſhall not take away the entrie of the diſſeiſee, *cauſâ quâ ſuprà*.

"*Contrarium tenetur, &c.*" This is an addition, and therefore to be paſſed over. And at this day, this caſe of *Littleton* is holden for cleere law.

(Ant. 238. b.)

Sect. 395.

ITEM, ſi un diſſeiſor enfeoffa ſon pier en fee, et le pier moruſt de tiel eſtate ſeiſie, per que les tenements diſcendont a le diſſeiſor, ‡ *come fits et heire, &c. en ceſt caſe le diſſeiſee bien poit enter ſur le diſſeiſor, nient obſtant le diſcent, pur ceo que quant al diſſeiſin, le diſſeiſor ſerra adjudge eins lorſque come diſſeiſor, nient obſtant le diſcent,* ‖ quia particeps criminis.

ALSO, if a diſſeiſor enfeoffe his father in fee, and the father die, ſeiſed of ſuch eſtate, by which the land deſcend to the diſſeiſor, as ſonne and heire, &c. in this caſe the diſſeiſee may well enter upon the diſſeiſor, notwithſtanding the diſcent, for that as to the diſ- [242. a.] ſeiſin, the diſſeiſor ſhall bee adjudged in but as a diſſeiſor, notwithſtanding the diſcent, *quia particeps criminis* (1).

15 E. 4. 23. a.
11 E. 4. 2.
18 E. 4. 25. a.
33 H. 6. 5. b.
34 H. 6. 11.
12 H. 8. 9.
24 H. 8. 3. 9.
16 H. 8. 5.
5 H. 7.
29 Aſſ. 54.

OF this ſufficient hath beene ſaid before in this chapter, Sect. 386. And regularly it is true, that albeit a diſcent be caſt, and the entrie of the diſſeiſee taken away, yet if the diſſeiſor commeth to the land againe, either by diſcent, or purchaſe of any eſtate or freehold, which is implyed in the (&c.) the diſſeiſee may enter upon him, or have his aſſiſe againſt him, as if no diſcent or meane conveyance had beene, *quia particeps criminis*.

39 E. 3. 25, 26. (Poſt. Sect. 409.)

‡ *ent* added in L. and M. ‖ *&c.* added: *quia particeps criminis*, not in L. and M.

(1) [See Note 172.]

Sect.

Sect. 396.

ITEM, ſi home ſeiſie de certaine terre, en fee ad iſſue deux fits, et moruſt ſeiſie, et le puiſne fits entra per abatement en la terre, quel ad iſſue, et de ceo moruſt ſeiſie, et les tenements diſcendont al iſſue, et l'iſſue entra en la terre: en ceſt caſe le fits eigne, ou ſon heire, poit enter per la ley ſur l'iſſue del fits puiſne, nient contreſteant le diſcent, pur ceo que quant le fits puiſne abatit en la terre, apres le mort ſon pier devant aſcun entrie per le fits eigne † fuit, la ley intendra que il entra en claymant come heyre a ſon pier. Et pur ceo que l'eigne fits clayma per meſme le title, ceſt aſcavoir, come heyre a ſon pier, il et ſes heires poient enter ſur l'iſſue de puiſne ‡ fits, nient obſtant le diſcent, &c. pur ceo que ils claymont per un meſme title. Et en meſme le maner il ſerra, ſi fueront pluſors diſcents de un iſſue a un auter iſſue del puiſne fits.

ALSO, if a man ſeiſed of certaine land in fee have iſſue two ſons, and die ſeiſed, and the younger ſonne enter by abatement into the land, and hath iſſue, and dieth ſeiſed thereof, and the land deſcend to his iſſue, and the iſſue enters into the land: in this caſe the eldeſt ſonne, or his heire, may enter by the law upon the iſſue of the younger ſon, notwithſtanding the diſcent, becauſe that when the younger ſon abated into the land after the death of his father, before any entrie made by the eldeſt ſonne, the law intend that hee entred claiming as heire to his father. And for that the eldeſt ſonne claimes by the ſame title, that is to ſay, as heire to his father, hee and his heires may enter upon the iſſue of the younger ſon, notwithſtanding the diſcent, &c. becauſe they claime by the ſame title. And in the ſame manner it ſhall be, if there were more diſcents from one iſſue to another iſſue of the younger ſonne (1).

Sect. 397.

MES en tiel caſe, ſi le pier fuit ſeiſie de certaine terres en fee, et ad iſſue deux fits, et devie, et l'eigne ‖ fits enter, et eſt ſeiſie, &c. et puis le puiſne frere luy diſſeiſiſt, per quel diſſeiſin il eſt ſeiſie en fee, et ad iſſue, et de tiel eſtate moruſt ſeiſie, donques l'eigne frere ne poit enter, mes eſt mis a ſon briefe d'entre ſur diſſeiſin, &c. § *de recoverer la terre. Et la cauſe eſt, pur ceo que le puiſne frere vient a les tenements per tortious diſſeiſin fait a ſon eigne frere, et per el tort la ley ne poit*

BUT in this caſe, if the father were ſeiſed of certaine lands in fee, and hath iſſue two ſons, and die, and the eldeſt ſonne enter, and is ſeiſed, &c. and after the younger brother diſſeiſeth him, by which diſſeiſin he is ſeiſed in fee, and hath iſſue, and of this eſtate dieth ſeiſed, then the elder brother cannot enter, but is put to his writ of *entrie ſur diſſeiſin, &c.* to recover the land. And the cauſe is, for that the youngeſt brother commeth to the lands by wrongful

† *fait* not in L. and M.
‡ *fits—frere*, L. and M. and Roh.
‖ *fits—frere*, L. and M. and Roh.
§ *&c.* not in L. and M. nor Roh.

(1) [See Note 273.]

"*SI baron et feme, come en droit ſa feme, ont title et droit d'enter, &c. et tiel tenant morust ſeiſie, &c.*"

9 H. 7. 24. a. 2 E. 4. 25. 7 E. 3. 47. b. 20 H. 6. 28. b. 42 E. 3. 12. 15 E. 4. diſcent. 30.

Theſe words are generall, but are particularly to bee underſtood, viz. when the wrong was done to the wife during the coverture; for if a feme ſole be ſeiſed of lands in fee, and is diſſeiſed, and then taketh huſband; in this caſe the huſband and wife, as in the right of the wife, have right to enter, and yet the dying ſeiſed of the diſſeiſor in that caſe ſhall take away the entry of the wife after the death of her huſband; and the reaſon is aſwell for that ſhee herſelfe when ſhee was ſole, might have entred and recontinued the poſſeſſion, as alſo it ſhall be accounted her folly that ſhee would take ſuch a huſband which would not enter before the diſcent.

9 H. 7. 24.

But there if the woman were within age at the time of her taking of huſband, then the dying ſeiſed ſhall not after the deceaſe of her huſband take away her entry; becauſe no folly can bee accounted in her, for that ſhee was within age when ſhee tooke huſband, and after coverture ſhe cannot enter without her huſband; all which is implyed in the ſaid (*&c.*). [246. b.]

Vid. Sect. 492. Hob. 96. Ant. 233. b. 1 Lev. 266. 8 Rep. 100. 1 Roll. 4. Plo. 23.

"*Laches le baron ne turnera la fem, &c. al prejudice, &c.*" *Laches* ſignifieth in the common law, retchleſneſſe, or negligence, *et negligentia ſemper habet infortunium comitem.* Here is a diverſity to be obſerved, that albeit regularly no laches ſhall be accounted in infants, or feme coverts, as is aforeſaid, for not entry or clayme to avoid diſcents, yet laches ſhall be accounted in them for no performance of a condition annexed to the ſtate of the land. For if a feme be infeoffed either before or after marriage, reſerving a rent, and for default of payment a re-entrie; in that caſe, the laches of the baron ſhall diſherit the wife for ever. And ſo it is [*u*] of an infant; his laches, for not performing of a condition annexed to a ſtate, either made to his anceſtor or to himſelfe, ſhall barre him of the right of the land for ever.

20 H. 6. 28. b. [u] 31 Aſſ. p. 17. 42 E. 3. 1. Pl. Com. 55. 10 H. 7. 13 H. 7. 35 H. 6. 41.

If a man make a feoffment in fee to another reſerving a rent, and if he pay not the rent within a moneth, that he ſhall double the rent, and the feoffee dieth, his heire within age, the infant payeth not the rent, he ſhall not by this laches forfeit any thing. But otherwiſe it is of a feme covert; and the reaſon and cauſe of this diverſity is, for that the infant is provided for by the ſtatute, [*o*] *non current uſuræ contra aliquem infra ætatem exiſten', &c.* But that ſtatute doth not extend to a feme covert, neither doth that ſtatute extend to a condition of a re-entry; which an infant ought to performe, for the forfeiture thereof cannot bee called *uſura.*

Pl. Com. 136. b. Fleta lib. 2. cap. 50.

[o] Le ſtatute de Merton, ca. 5.

* Sect. 404.

MES la court tient, lou tiel title eſt done al feme ſole, que puis prent baron que n'entra pas, eins ſuffer un diſcent, &c. la auter eſt, car ſerra dit

BUT the court holdeth, where ſuch title is given to a fem ſole, who after taketh huſband which doth not enter, but ſuffer a diſcent, &c: there

* This Section is not in L. and M. nor Roh.

dit la folly le feme de prendre tiel baron que n'entre en temps, &c.

there otherwiſe it is, for it ſhall be ſaid the folly of the wife to take ſuch a huſband which entered not in time, &c.

THIS is added, and therefore, as formerly I have done, I meddle not withall; howbeit the opinion is holden for law, as it appeareth in the ſection next precedent. 9. H. 7. 24.

Sect. 405.

ITEM, ſi home que eſt de non ſane memorie, que eſt a dire en Latin, qui non eſt compos mentis, *ad cauſe d'entre en aſcuns tiels tenements, ſi tiel diſcent,* ut ſupra, *ſoit ewe en ſa vie durant le temps que il fuit de non ſane memorie, et puis devia, ſon heire bien poit enter ſur luy que eſt eins per diſcent. Et en ceſt caſe poyes veier un cas, que l'heire poit enter, et uncore ſon anceſter que avoit meſme le title ne puiſſoit enter. Car celuy que fuit hors de ſa memorie al temps de tiel diſcent, s'il voile enter apres tiel diſcent, ſi action ſur ceo ſoit ſue envers luy, il n'ad riens pur luy a pleder, ou de luy ayder, mes a dire, que il fuit de non ſane memorie al temps de tiel diſcent, &c. Et a ceo ne ſerra il reſceive a dire, pur ceo que nul home de pleine age ſerra reſceive en aſcun plee per la ley a* diſabler le perſon demeſne, mes le heire bien poit diſabler le perſon ſon auncеſter pur ſon advantage † demeſne en tiel cas, pur ceo que nul laches poit eſtre adjudge per la ley en celuy que ad nul diſcretion en tiel caſe.*

ALSO, if a man which is of non ſane memory, that is to ſay in Latine, *qui non eſt compos mentis,* hath cauſe to enter into any ſuch tenements, if ſuch diſcent, *ut ſupra,* bee had in his life during the time that he was not of ſound memorie, and after dieth, his heire may well enter upon him which is in by diſcent. And in this caſe you may ſee a caſe, where the heire may enter, and yet his anceſtor which had the ſame title could not enter. For hee which was out of his memorie at the time of ſuch diſcent, if hee will enter after ſuch a diſcent, if an action upon this be ſued againſt him, he hath nothing to plead for himſelfe, or to helpe him, but to ſay, that hee was not of ſane memorie at the time of ſuch diſcent, &c. And he ſhall not bee received to ſay this, for that no man of full age ſhall bee received in any plea by the law to diſable his owne perſon, but the heire may well diſable the perſon of his anceſtor for his owne advantage in ſuch caſe, for that no laches may bee adjudged by the law in him which hath no diſcretion in ſuch caſe.

HERE *Littleton* explaineth a man of no ſound memorie to be *non compos mentis.* Many times (as here it appeareth) the Latin word explaineth the true ſenſe, and calleth him not *amens, demens, furioſus, lunaticus, fatuus, ſtultus,* or the like, for *non compos mentis* is moſt ſure and legall (1). Pl. Com. fo. 368. b. per Sanders. lib. 4. fo. 127. 182. Beverley's caſe.

Mirror cap. 1. ſect. 9. ca. 5. ſect. 1. Bract. fo. 165 and 420. Britton fo. 167. b. 217. 66. Fleta li. 6. ca. 39. Fitz. N. B. 222. b. Stanf. Prer. 33, 34. (Hob. 96. Sid. 112.)

* *diſtultifer et* added L. and M. and Roh. † *demeſne—del heire,* L. and M. and Roh.

(1) [See Note 185.]

(8 Inſt. 14.)

Non compos mentis is of foure ſorts; 1. *Idiota*, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2. Hee that by ſickneſſe, griefe, or other accident, wholly loſeth his memorie and underſtanding. 3. A lunatique that hath ſometime his underſtanding and ſometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, ſo long as he hath not underſtanding. Laſtly, hee that by his owne vitious act for a time depriveth himſelfe of his memorie and underſtanding, as he that is drunken. But that kinde of *non compos mentis* ſhall give no privilege or benefit to him or to his heires. And a diſcent ſhall (1) take away the entrie of an ideot, albeit the want of underſtanding was perpetuall; for *Littleton* ſpeaketh generally of a man of non ſane memorie. So likewiſe if a man that becomes *non compos mentis* by accident, as is aforeſaid, be diſſeiſed and ſuffer a diſcent, albeit he recover his memorie and underſtanding againe, yet hee ſhall never avoid the diſcent; and ſo it is *à fortiori* of one that hath *lucida intervalla*. As for a drunkard who is *voluntarius dæmon*, he hath (as hath beene ſaid) no privilege thereby, but what hurt or ill ſoever he doth, his drunkenneſſe doth aggravate it; *Omne crimen ebrietas & incendit, & detegit*.

[247. a.]

Lib. 4. 124, 125. Beverleye's caſe

(8 Rep. 170.)

(Plo. Com. 19.)

If an ideot make a feoffment in fee, he ſhall in pleading never avoid it by ſaying that hee was an ideot at the time of his feoffment, and ſo had beene from his nativitie. But upon an office found for the king, the king ſhall avoid the feoffment, for the benefit of the ideot, whoſe cuſtodie the law giveth to the king.

(4 Rep. 123. b. F. N. B. 232.) 39 H. 6. 12. b. Abb. Aſſ. 89. b. F. N. B. 202. 5 E. 3. 70. Britton cap. 28. fol. 66. 25 Aſſ. pl. 4. 35 Aſſ. pl. 10. 32 E. 3. tit. Scire fac. 160. Stanf. Pr. 34. F. N. B. 202. a. Beverleye's caſe lib. 4. 126, 127, 128.

So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis*, if an eſtate be made during his lunacie: for albeit the parties themſelves cannot bee received to diſable themſelves, yet twelve men upon their oathes may finde the truth of the matter. But if any of them alien by fine or recoverie, this ſhall not onely binde himſelfe, but his heires alſo. (2) As amongſt other things requiſite to be knowen, theſe caſes you ſhall finde at large in my Commentaries, whereunto, for brevitie, I referre the reader: upon all which bookes there have beene foure ſeverall opinions concerning the alienation, or other act of a man that is *non compos mentis, &c.* For, firſt, ſome are of opinion, that hee may avoid his owne act by entrie, or plea. Secondly, others are of opinion, that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ; and of this opinion is *Fitzherbert* in his *Natura Brevium, ubi ſupra*. And *Littleton* here is of opinion, that neither by plea nor by writ, nor otherwiſe, he himſelfe ſhall avoid it, but his heire (in reſpect his anceſtor was *non compos mentis*) ſhall avoid it by entrie, plea, or writ. And herewith the greateſt authorities of our bookes agree; and ſo was it reſolved with *Littleton* in *Beverleye's* caſe; [r] where it is ſaid, that it is a maxim of the common law, that the partie ſhall not diſable himſelfe. But this holdeth only in civil cauſes; for in criminall cauſes, as felonie, &c. the act and wrong of a madman ſhall not bee imputed to him, for that in thoſe cauſes, *actus non facit reum, niſi mens ſit rea*, and he is *amens (id eſt) ſine mente*, without his minde or diſcretion; and *furioſus ſolo furore punitur*, a madman is only puniſhed

[247. b.]

Vide Br. tit. Dum fuit infra ætatem 5.

[r] Lib. 4. fol. 126, 127. (Plo. 19. a. F. N. B. 232.)

(1) In all the editions except the firſt, the word *not* is here erroneouſly inſerted.

(2) [See Note 186.]

puniſhed by his madneſſe. And ſo it is of an infant, untill he be of the age of fourteene, which in law is accounted the age of diſcretion. 26 Aſſ. 27. 21 H. 7. 31. Stanford 16. b. 8 E. 2. Coron. 412. 414. 351.

"*Et en ceſt caſe poyes veir un caſe, &c.*" And though *Littleton* ſaith (one caſe), yet other caſes may be found to the ſame end. For if there be grandfather, father, and ſon, and the father diſſeiſe the grandfather, and make a feoffment in fee, without warrantie, the grandfather dieth, albeit the right deſcend to the father, he cannot by this right deſcended enter againſt his owne feoffment; but if he die the ſonne ſhall enter, and avoid the eſtate of the feoffee. 22 E. 3. ibid. 224. Beverley's caſe, ubi ſupra. F. N. B. 202. D. 5 H. 7. 2. Vide 3 E. 3. tit. Entrie Cong. Statham.

12 E. 4. 8. 39 H. 6. 4. Abbr. Aſſ. 89. 39 H. 6. 43. (Poſt. 265.)

So if the grandfather be tenant in taile, and the father diſſeiſe him, *ut ſupra, mutatis mutandis*. 15 E. 4. tit. Diſcent 30.

If lands be given to two and to the heires of one of them, he that hath the fee ſimple ſhall not have an action of waſte upon the ſtatute of *Glouceſter*, againſt the joyntenant for life, but his heire ſhall maintaine an action of waſte againſt him, upon the ſtatute of *Glouceſter*; ſo the heire ſhall maintaine that action which the anceſtor could not. (Ant. 53. b. 200. b.)

Sect. 406.

*ET ſi tiel home de non ſane memorie fait feoffment, &c. il * meſme ne poit enter, ne aver briefe appell'* Dum non fuit compos mentis, &c. cauſâ quâ ſupra: *mes apres † la mort ſon heire bien poit enter, ou aver le dit briefe* Dum non fuit compos mentis *a ſon election ‡. Meſme la ley eſt lou enfant deins age fait feoffement, et devie, ſon heire poit enter, ou aver un briefe de* Dum fuit infra ætatem, &c.

AND if ſuch a man of non ſane memorie make a feoffment, &c. hee himſelfe cannot enter, nor have a writ called *Dum non fuit compos mentis, &c. cauſâ quâ ſupra:* but after his death his heire may well enter, or have the ſaid writ of *Dum non fuit compos mentis* at his choice. The ſame law is where an infant within age maketh a feoffment, and dieth, his heire may enter, or have a writ of *Dum fuit infra ætatem, &c.*

"*FAIT feoffment, &c.*" Or any other like conveyance *in pais*; but fines and other aſſurances of record are not implyed in this (*&c.*).

"*Meſme la ley d'un enfant.*" This is true, as to the bringing of a *Dum fuit infra ætatem, &c.* but without queſtion the infant in that caſe might have entered, as it appeareth in the next Section (1).

"*Briefe*

* *meſme* not in L. and M. nor Roh. † *la—ſa* L. and M. and Roh.
‡ *&c.* added L. and M. and Roh. The reſt of this Section not in L. and M. nor Roh.

(1) See the obſervation of Mr. Dunning on this paſſage in his argument in the caſe of Zouch ex demiſs. Abbot and Hallett v. Parſons and Hallett, 3 Burr. 1794.

"*Briefe* Dum non fuit compos mentis." This writ (as it appeareth by our author) lieth for the heire of him that was *non compos mentis*, and not for himſelfe; but a *Dum fuit infra ætatem* lieth as well for the anceſtor himſelf after his full age, as for his heire.

Sect. 407. [248. a.]

*ITEM, ſi jeo ſue * diſſeiſie per un enfant deins age, lequel aliena a un auter in fee, et l'alienee devie ſeiſie, et les tenements diſcendont a ſon heire, † eſteant l'enfant deins age, mon entry eſt tolle, &c. ‡*

ALSO, if I be diſſeiſed by an infant within age, who alieneth to another in fee, and the alienee dieth ſeiſed, and the lands deſcend to his heire, being an infant within age, my entrie is taken away, &c. (1)

Sect. 408.

MES ſi l'enfant deins age enter ſur l'heire que eſt § eins per diſcent, come il bien poit, pur ceo que ‖ meſme le diſcent fuit durant ſon nonage, donque jeo bien puiſſe enter ſur le diſſeiſor, pur ceo que per ſon entrie il ad defeat et anient le diſcent.

BUT if the infant within age enter upon the heire which is in by diſcent, as he well may, for that the ſame diſcent was during his nonage, then I may well enter upon the diſſeiſor, becauſe by his entrie hee hath defeated and taken away the diſcent.

Vide the next Sect. following.

HERE it appeareth, that the entrie of the infant is lawfull, and giveth advantage to the diſſeiſee to enter alſo, becauſe the diſcent, which was the impediment, is avoided. And it is to be obſerved, that if the diſcent be caſt, the infant being within age, he may enter at any time, either within age, or after his full age.

43 E. 3. tit. Entr. Cong. Vet. N. B. 136. b. F. N. B. 192. 45 E. 3. 21.

And ſo it is if an infant make a feoffment, &c. he may enter either within age, or at any time after his full age, and ſo in both caſes may his heire.

Sect. 409.

*EN meſme le manner eſt, lou jeo ſue diſſeiſie, et le diſſeiſor fait feoffment en fee ſur condition, et le feoffee moruſt de tiel eſtate ſeiſie, ¶ jeo ne purroy ** my enter ſur †† l'heire le feoffee:*

IN the ſame manner it is, where I am diſſeiſed, and the diſſeiſor make a feoffment in fee upon condition, and the feoffee die of ſuch eſtate ſeiſed, I may not enter upon the heire of

* *diſſeiſie* not in Roh. but in L. and M.
† *eſt* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
§ *eins—heire*, L. and M. and Roh.
‖ *meſme* not in L. and M. but in Roh.
¶ *&c.* added L. and M. and Roh.
** *my* not in L. and M. nor Roh.
†† *l'heire—la terre*, L. and M. and Roh.

(1) [See Note 187.]

feoffee: mes ſi le condition ſoit enfreint, iſſint que pur cel cauſe le feoffor enter ſur l'heire, ore jeo bien puiſſe enter, pur ceo que quant le feoffor ou ſes heires entront pur le condition enfreint, le diſcent eſt ouſterment defeat, &c. ‡‡

of the feoffee: but if the condition bee broken, ſo as for this cauſe the feoffor enter upon the heire, now I may well enter, for that when the feoffor or his heires enter for the condition broken, the diſcent is utterly defeated, &c.

THE reaſon hereof is apparent, for *ceſſante cauſâ, ceſſat cauſatum.* Tenant *in capite* maketh a feoffment in fee to the uſe of the feoffee and his heires, untill the feoffor pay an hundred pounds to him or his heires, the feoffee dieth his heire within age, now hath the king the wardſhip of the bodie, and is intituled to the gard of the land. But if the feoffor pay the hundred pounds according to the limitation, the wardſhip is deveſted, both for the body and the land, and ſo it is in caſe of a condition: for, as *Littleton* here ſaith, the diſcent, which is the cauſe of wardſhip, is utterly defeated. And by theſe two laſt caſes which *Littleton* hath here put, it appeareth, that there is no difference, where the diſcent is diſ-
[248. b.] affirmed by a right paramount, as where the ſtate was never lawfull, (as in the caſe of an infant,) and where the diſcent is affirmed for a time, the eſtate being lawfull, and being after defeated by matter *ex poſt facto*, by a title of re-entry.

Vide the Sect. next precedent. Dyer 13 El. fol. 298, 299. (Ant. 5. 395.)

(Ant. 76. b.)

Sect. 410.

ITEM, ſi jeo ſoy diſſeiſie, et le diſſeiſor ad iſſue et enter en religion, per force de quel les tenements diſcendont a ſon iſſue, en ceſt caſe jeo bien puiſſe enter ſur l'iſſue, et uncore la fuit un diſcent. Mes pur ceo que tiel diſcent vient al iſſue per fait le pier, ſcilicet, *pur ceo que il enter en religion, &c. et le diſcent ne vient a luy per fait de Dieu,* ſcilicet, *per mort, &c. mon entre eſt congeable. Car ſi jeo arraigne un aſſiſe de* novel diſſeiſin *envers mon diſſeiſor, coment que il puit enter en religion, ceo ne abatera my mon briefe, mes mon briefe (ceo non obſtant) eſtoyera en ſa force, et* * *mon recovere vers luy ſerra bonne.* † *Et per meſme le reaſon le diſcent que aveigne a ſon iſſue per ſon fait demeſne, ne tollera moy de mon entrie, &c.*

ALSO, if I be diſſeiſed, and the diſſeiſor hath iſſue and entreth into religion, by force whereof the lands deſcend to his iſſue, in this caſe I may well enter upon the iſſue, and yet there was a diſcent. But for that ſuch diſcent commeth to the iſſue by the act of the father, *ſcilicet,* for that he entred into religion, &c. and the diſcent came not unto him by the act of God, *(ſcilicet)* by death, &c. my entry is congeable. For if I arraigne an aſſiſe of *novel diſſeiſin* againſt my diſſeiſor, albeit he after enter into religion, this ſhall not abate my writ, but my writ (notwithſtanding this) ſhall ſtand in his force, and my recovery againſt him ſhall bee good. And by the ſame reaſon the diſcent which commeth to his iſſue by his own act, ſhal not take from me my entry, &c.

‡‡ *&c.* not in L. and M. nor Roh.
* *mon recovere* not in L. and M. nor Roh.
† *Et* not in L. and M. nor Roh.

Vide Sect. 200. (Ant. 132.)

"*ENTRE en religion, &c.*" Here is implied profeſſion. This diſcent ſhall not barre the entry of the diſſeiſee, for that the diſcent commeth by the deed of the father, becauſe he entred into religion, wherein there is an excellent point worthy of obſervation: for albeit the entry into religion make not the diſcent, but the profeſſion, whereof you have read before, *Sect.* 200, yet here you may learne by *Littleton* that the law reſpects the originall act, and that is, his entry into religion, which is his owne act, whereupon the profeſſion followed; whereby the diſcent hapned; for *Cujuſque rei potiſſima pars, principium eſt.* And againe, *Origo rei inſpici debet*, whereof you ſhall make great uſe in reading of our bookes. * Here *Littleton* attributeth the cauſe of the diſcent to his entry into religion, which was his owne act, whereas a diſcent doth not take away an entry unleſſe it commeth by death, which as *Littleton* ſaith, is the act of God, and no glorious pretext of an act (no, though it bee of religion) ſhall work a wrong to a ſtranger, that hath right, to barre him of his entrie. But it is ſaid, that in the caſe of the baſtard eigne, and *mulier puiſne*, ſuch a diſcent ſhall bind the *mulier*, as before hath beene ſaid, and ſuch an heire that commeth in by ſuch a diſcent, ſhall have his age.

(Ant. 126. b. 238. b. 3 Rep. 61.)

* Vide Pl. Com. Dame Hale's caſe.

6 E. 3. 41, &c.

10 E. 3. 55. (Ant. 244.)

3 H. 6. 41. 10 H. 6. 10. b. 18 E. 4. 19. 9 E. 4. 25. 52. 7 E. 4. 15. 18 E. 3. 24, 25 E. 3. 39. 46 E. 3. 25. 30 E. 1. Briefe 885. Bracton lib. 4. fo. 189. & lib. 5. fo. 414.

"*Car ſi jeo arraigne un aſſiſe, &c.*" *Nota*, if a man be tenant or defendant in a reall or perſonall action, and hanging the ſuit the tenant or defendant entreth into religion, by this the writ is not abated, becauſe it is by his owne act. And ſo it is of a reſignation; but otherwiſe it is of a depoſition, or deprivation, becauſe he is expelled by judgment, and yet his offence, &c. was the cauſe thereof, *ſed in præſumptione legis, judicium redditur in invitum.*

22 E. 2. Briefe 936. 15 Aſſ. pl. 8.

"*Moy de mon entry, &c.*" Here is implyed, or any of my heires.

Sect. 411. [249. a.]

*ITEM, ſi jeo leſſe a un home certaine terres pur terme de 20 ans, et un auter moy diſſeiſiſt, et ouſta le termor, et devie ſeiſie, et les tenements diſcendont a ſon heire, jeo ne purroy enter; et uncore le leſſee pur terme d'ans bienpuit enter, pur ceo que il per ſon entry ne ouſta l'heire que eſt eins per diſcent de le franktenement que eſt a luy diſcendus, mes ſolement * claime d'aver les tenements pur terme d'ans, lequel n'eſt † pas expulſement de le franktenement del heire que eſt eins per diſcent. Mes auterment eſt ou mon*

ALSO, if I let unto a man certaine lands for the terme of twenty yeares, and another diſſeiſeth me, and ouſt the termor, and die ſeiſed, and the lands deſcend to his heire, I may not enter; and yet the leſſee for yeares may well enter, becauſe that by his entry hee doth not ouſte the heire who is in by diſcent of the freehold which is deſcended unto him, but only claymeth to have the lands for terme of yeares, which is no expulſion from the freehold of the heire who is in by diſcent. But otherwiſe

* *claime* not in L. and M. nor Roh.

† *pas* not in L. and M. nor Roh.

mon tenant a terme de vie eſt ‡ diſſeiſie, cauſa patet, &c. ‖

otherwiſe it is where my tenant for terme of life is diſſeiſed, *cauſa patet*, &c. (1)

"*PUR terme de* 20 *ans.*" It is cleere that a diſcent ſhall not take away the entrie of a leſſee for yeares, as our author here ſaith, nor of a tenant by *elegit*, or tenant by ſtatute merchant, or ſuch like, as have but a chattle and no freehold; and the reaſon is, for that by their entry upon the heire by diſcent, they take no freehold (which, as often hath bin obſerved, is ſo much reſpected in law) from him; but otherwiſe it is of an eſtate for life, or any higher eſtate. And as a diſcent of a freehold and inheritance ſhall take away the entry of him that right hath to a freehold, or inheritance, ſo a diſcent of a freehold and inheritance cannot take away the entry of him that hath but a chattle, for that no diſcent or dying ſeiſed can be of the ſame.

(2) A man ſeiſed of an advowſon in fee grants three avoydances one after another, and after the church becommeth void, and the grantor preſents, and his clarke is admitted and inſtituted, and after the church becomes void againe, the grantee may preſent to the ſecond avoydance, for that he was not put out of the poſſeſſion thereof; for as the leſſor having the freehold and inheritance cannot diſſeiſe his leſſee for years, having but a chattle, that any diſcent may be caſt to take away his entry (as *Littleton* here ſaith); ſo in the ſaid caſe the grantor hath the franktenement and fee of the advowſon rightfully, ſo as he cannot make any uſurpation, to gaine any eſtate, or to put the grantee ſo out of poſſeſſion as that he ſhould not preſent, no more than the leſſee for yeares in this caſe, to enter. Alſo in reſpect of the privitie that is betweene them, the uſurpation of the grantor ſhall not put the grantee out of poſſeſſion for the two latter avoydances. And this was reſolved [a] by all the judges of the court of common pleas, which I myſelfe heard and obſerved.

(See 2 Roll. Abr. 371. Hob. 322, 323. 5 Rep. 57. 102.)

[a] Hil. 18 Eliz. in communi banco.

Sect. 412.

ITEM, il eſt dit que ſi home eſt ſeiſie de tenements en fee per occupation en temps de guerre, et ent moruſt ſeiſie en temps de guerre, et les tenements diſcendont a ſon heire, tiel diſcent ne ouſtera aſcun home de ſon entry; et de ceo home poit vier en un plee ſur un briefe de ail, an. 7. E. 2.

ALSO, it is ſaid, that if a man be ſeiſed of lands in fee by occupation in time of warre, and thereof dieth ſeiſed in the time of warre, and the tenements diſcend to his heire, ſuch diſcent ſhall not ouſt any man of his entry; and of this a man may ſee in a plea upon a writ of aiel, 7 E. 2.

"*PER occupation en temps de guerre.*" Firſt, it is neceſſarie to be knowne, what ſhall bee ſaid time of peace, *tempus pacis*; and what ſhall be ſaid *tempus belli*, *ſive* (4 Inſt. 125.)

‡ *diſſeiſie—ſeiſe*, &c. L. and M. and Roh. ‖ &c. not in L. and M. nor Roh.

(1) [See Note 188.] (2) [See Note 189.]

Inter brevia de anno 1 E. 3. parte 1. & paſch. 28 E. 3. inter adjudicata coram rege. lib. 2. fol. 37. in Theſaur. Paſch. 39 E. 3. inter adjudicata coram rege in Theſaur. lib. 2. fol. 92. (Cro. Car. 71.) 14 E. 3. tit ſcire facias 122. but more fully in the record at large.

ſive guerræ, time of warre. *Tempus pacis eſt quando cancellaria, & aliæ curiæ regis ſunt apertæ, quibus lex fiebat* [249. b.] *cuicunque prout fieri conſuevit.* And ſo it was adjudged in the caſe of *Roger Mortimer*, and of *Thomas* earle of *Lancaſter*. *Utrùm terra ſit guerrina necne, naturaliter debet judicari per recorda regis, & eorum, qui curias regis per legem terræ cuſtodiunt, & gubernant, ſed non alio modo.*

And therefore when the courts of juſtice be open, and the judges and miniſters of the ſame may by law protect men from wrong and violence, and diſtribute juſtice to all, it is ſaid to be time of peace. So, when by invaſion, inſurrection, rebellions, or ſuch like, the peaceable courſe of juſtice is diſturbed and ſtopped, ſo as the courts of juſtice be as it were ſhut up, *et ſilent leges inter arma*, then it is ſaid to be time of warre. And the triall hereof is by the records, and judges of the court of juſtice; for by them it will appeare whether juſtice had her equall courſe of proceeding at that time or no, and this ſhall not be tried by jury.

If a man be diſſeiſed in time of peace, and the diſcent is caſt in time of warre, this ſhall not take away the entry of the diſſeiſee.

Bracton lib. 4. fol. 240.

Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem eſt, quod tempore guerrino, quod nihil differt à tempore juris, & injuriæ; eſt enim tempus injuriæ, cum fuerunt oppreſſiones violentæ, quibus reſiſti non poteſt & diſſeiſinæ injuſtæ.

So as hereby it alſo appeareth, that time of peace is the time of law and right, and time of warre is the time of violent oppreſſion, which cannot be reſiſted by the equall courſe of law. And therefore in all reall actions, the expleas, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law (1).

Ingham cap. de novel diſſeiſin.

"*Per occupation.*" *Occupation* is a word of art, and ſignifieth a putting out of a man's freehold in time of warre; and it is all one with a diſſeiſin in time of peace, ſaving that it is not ſo dangerous as it appeareth here by *Littleton*; and therefore the law gave a writ in that caſe of *occupavit*, ſo called, by reaſon of that word in the writ, in ſtead of *diſſeiſivit*, in the *aſſiſe* of *novel diſſeiſin*, if the diſ-

Lib. 4. fol. 49, 50. Oguel's caſe.

ſeiſin had beene done in time of peace; whereby it appeareth, how aptly both in this, and in all other places, *Littleton* thorow his whole booke ſpeaketh. But albeit *occupatio*, whereof *Littleton* here ſpeaketh, is uſed only in the ſaid writ (2) and in none other, (that I can finde or remember) yet hath it beene uſed commonly in conveyances and leaſes, to limit, or make certaine precedent words, as *ad tunc in tenurâ & occupatione*. But *occupatio* is applyed to the poſſeſſion, be it lawfull or unlawfull; it hath alſo crept into ſome acts of parliament, as 4 *H.* 7. *cap.* 19. 39 *Eliz. cap.* 1. and others; and *occupare* is ſometimes taken to conquer.

"*Et de ceo home poit vier en un plea ſur briefe de aiel, anno* 7 *E.* 2." Hereby it appeares, that ancient termes or yeares, after the example of *Littleton*, are to bee cited and vouched for confirmation of the law, albeit they were never printed: and that of thoſe yeares, thoſe

(1) [See Note 190.] (2) [See Note 191.]

thoſe eſpecially of *E.* 1. *H.* 3. &c. are worthy of the reading and obſervation; a great number of which I have ſeene and obſerved, which in mine opinion doe give a great light, not onely to the underſtanding and reaſon of the common law, (which *Fitzherbert* either ſaw not, or were by him omitted) but alſo to the true expoſition of the ancient ſtatutes made in thoſe times. Yet mine advice is, that they be read in their time. For after our ſtudent is enabled and armed to ſet on our yeare bookes, or reports of the law, let him reade firſt the latter reports, for two cauſes. Firſt, for that for the moſt part the latter judgements and reſolutions are the ſureſt, and therefore it is the beſt to ſeaſon him with them in the beginning, both for the ſettling of his judgment, and for the retaining of them in memorie. Secondly, for that the latter are more facile and eaſier to be underſtood than the more ancient: but after the reading of them, then to reade theſe others before mentioned, and all the ancient authors that have written of our law; for I would wiſh our ſtudent to be a compleat lawyer. But now to returne: As it is in caſe of diſcent, ſo it is in caſe of preſentation, for no uſurpation in time of warre putteth the right patron out of poſſeſſion, albeit the incumbent come in by inſtitution and induction: and time of warre doth not onely give privilege to them that be in warre, but to all others within the kingdome; and although the admiſſion and inſtitution be in time of peace, yet if the preſentment were in time of warre, it putteth not the right patron out of poſſeſſion.

6 E. 3. 41. 7 E. 3. darr. preſ. 2. 18 E. 2. quar. imp. 175. F. N. B. 31.

[250. a.]

Sect. 413.

ITEM, * *que nul morant ſeiſie (ou les tenements viendront a un auter per ſucceſſion)* † *tollera l'entre a'aſcun perſon, &c.* ‡ *Come de prelates, abbots, priors, deans, ou parſon d'eſgliſe,* ‖ *ou d'auters corps politicke, &c. coment que ils fueront xx. morants ſeiſie, et xx. ſucceſſors, ceo ne tolle jammes aſcun home de ſon entrie.* §

ALSO, that no dying ſeiſed (where the tenements come to another by ſucceſſion) ſhall take away the entrie of any perſon, &c. As of prelates, abbots, priors, deanes, or of the parſon of a church, or of other bodies politike, &c. albeit there were xx. dyings ſeiſed, and xx. ſucceſſors, this ſhall not put any man from his entrie.

Plus ſerra dit de diſcents en le prochein ¶ *chapter.*

More ſhall be ſaid of diſcents in the next chapter.

"*PER ſucceſſion.*" This in the common law is applied only to bodies politike, or corporate, which have ſucceſſion perpetuall, and not to naturall men: as to a biſhop and his ſucceſſors, or to an abbot, deane, archdeacon, prebend, parſon, &c. and their ſucceſſors, and not to *I. S.* of any other naturall body and his ſucceſſors, but to him and his heires. And the ſucceſſor of any of theſe is in the *poſt*, and the heire of the naturall man is in the *per*; and *ſuccedere* is derived of *ſub* and *cedere*.

Vid. Sect. 1. 7 E. 3. 25. a. 5 E. 3. 13. & 31.

" *Corpo*

* *que* not in L. and M. nor Roh.
† *ne* added in L. and M. and Roh.
‡ *Come—quor.* L. and M. and Roh.
‖ *ou d'auters corps politike,* not in L. and M. nor Roh.
§ *&c.* added L. and M. and Roh.
¶ *prochein chapitre—chapitre de continuelle clayme,* L. and M. and Roh.

"*Corps politique, &c.*" This is a body to take in ſucceſſion, framed (as to that capacity) by policie, and thereupon it is called here by *Littleton* a body politike; and it is alſo called a corporation, or a body incorporate, becauſe the perſons are made into a body, and are of capacity to take and grant, &c. And this body politike, or incorporate, may commence, and be eſtabliſhed three manner of ways, *viz.* by preſcription, by letters patents, or by act of parliament. Every body politike, or corporate, is either eccleſiaſticall or lay: eccleſiaſtical, either regular, as abbots, priors, &c. or ſecular, as biſhops, deanes, archdeacons, parſons, vicars, &c. lay, as maior and communaltie, baylifes and burgeſſes, &c. Alſo every body politike, or corporate, is either elective, preſentative, collative, or donative. And againe it is either ſole, or aggregate of many; as you may reade in the Third Part of my Commentaries. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium* or *univerſitas*.

Lib. 3. fo. 73. in the caſe of the Deane & Chapter of Norwich. (1 Sid. 162. 11 Rep. 77. a.)

Chap. 7. Continuall Claime. (1) Sect. 414.

*CONTINUAL claime eſt † la lou home ad droit et title d'entrer en aſcuns terres ou tenements dont ** auter eſt ſeiſie en fee, ou en fee taile, ſi ceſty que ad title d'entrer fait continuall claime a les terres ou tenements devant le morant ſeiſie de celuy que tient les tenements, donques coment que tiel tenant moruſt ent ſeiſi, et les terres ou tenements diſcendront a ſon heire, uncore poit celuy que avoit fait tiel claime, ou ſon heire, enter en les terres ou tenements iſſint diſcendus, per cauſe de le continual claime fait, nient contriſtiant le diſcent. Sicome en caſe que home ſoit diſſeiſie, et le diſſeiſee fait continual claime a les tenements en la vie le diſſeiſor, coment que le diſſeiſor devie ſeiſie en fee, et la terre diſcendiſt a ſon heire, uncore poit le diſſeiſee enter ſur la poſſeſſion le heire, nient obſtant le diſcent *.*

CONTINUAL claim is where a man hath right and title to enter into any lands or tenements whereof another is ſeiſed in fee, or in fee tail, if hee which hath title to enter makes continuall claime to the lands or tenements before the dying ſeiſed of him which holdeth the tenements, then albeit that ſuch tenant dieth therof ſeiſed, and the lands or tenements deſcend to his heire, yet may he who hath made ſuch continual claime, or his heire, enter into the lands or tenements ſo deſcended, by reaſon of the continuall claime made, notwithſtanding the diſcent. As in caſe that a man bee diſſeiſed, and the diſſeiſee makes continuall claime to the tenements in the life of the diſſeiſor, although that the diſſeiſor dieth ſeiſed in fee, and the land deſcend to his heire, yet may the diſſeiſee enter upon the poſſeſſion of the heire, notwithſtanding the diſcent.

HERE our Author firſt deſcribeth what a continuall claime is. It is called *continuum clameum*, becauſe at the common law it muſt have beene made within every yeare and day, as *Littleton* here teacheth. And yet if hee that right hath, maketh claime, and the ter-tenant dieth within the yeare and the day, this claime though it bee but once * made (as hath beene ſaid) ſhall preſerve [250. b.] the entry of him that maketh the claime (1).

Mirror cap. 1. § 15 & § 18. Bracton li. 5. fo. 435, 436. Britton 107. b. 126. 4. Fleta lib. 6. cap. 52, 53. Vid. Sect. 424. Vid. Sect. 385. 32 H. 8. c. 33. * Vid. Sect. 424

" *Ad droit et title d'enter.*" And yet in ſome caſes a continuall claime may be made by him that hath right, and cannot enter.

If tenant for years, tenant by ſtatute ſtaple, merchant, or *elegit*, be ouſted, and he in the reverſion diſſeiſed, the leſſor, or he in reverſion, may enter to the intent to make his claime, and yet his entry as to take any profits, is not lawfull during the terme. And in the ſame manner, the leſſor or he in the reverſion in that caſe may enter to avoid a collaterall warranty, or the leſſor in that caſe may recover in any aſſiſe. And ſo (as ſome have holden) may

Dyer 19 El. Pl. Com. 374. 15 H. 7 3, 4. Jacobin's caſe. 28 H. 6. 28.

† *per* added L. and M.
** *un* added L. and M.
* *&c.* added in L. and M. and Roh.

[250. b.]

(1) [See Note 192.] (1) [See Note 193.]

Vid. Sect. 442. 45 E. 3. 21.

may the leſſor enter in caſe of a leaſe for life, to this intent, to avoid a diſcent, or a warranty.

7 H. 6. 40. Contin. Claime, 1 Downcler's caſe. 5 E. 4. 4. (Plo. 191. a.) (9 Rep. 106.) (1 Rep. 67. a.)

If the diſſeiſee make continuall claime, and the diſſeiſor die ſeiſed within the yeare, his heire within age, and by office the king is intitled to the wardſhip, albeit the entry of the diſſeiſee bee not lawfull, yet may he make continuall claime to avoid a diſcent, and ſo in the like.

(1 Roll. Abr. 630.)

"Uncore poit celuy que fait tiel clayme ou ſon heire enter." This is to be underſtood in this manner: that if the father make claime, and the diſſeiſor dieth, and then the father dieth, that his heire may enter, becauſe the diſcent was caſt in the father's time, and the right of entry which the father gained by his claime ſhall deſcend to his heire. But if the father make continuall claime, and dieth, and the ſonne make no continuall claime, and within the yeare and day after the claime made by the father, the diſſeiſor dieth, this ſhall take away the entrie of the ſonne, for that the diſcent was caſt in his time, and the claime made by the father ſhall not availe him that might have claimed himſelfe. And of this opinion was *Littleton* himſelfe in our bookes, where he holdeth that no continuall claime can avoid a diſcent, unleſſe it be made by him that hath title to enter, and in whoſe life the dying ſeiſed was. See more of this matter hereafter, in this chapter, Sect. 416.

Bracton lib. 5. fo. 436. Fleta lib. 5. cap. 52, 53. 22 H. 6. 37. 9 H. 4. 5. a. 15 E. 4. 22. a.

23 H. 6. 37.

And as here *Littleton* putteth his caſe of the anceſtor and heire, ſo it holdeth in all reſpects of the predeceſſor and ſucceſſor.

(1 Rep. 14. a.)

Sect. 415. [251. a.]

*EN meſme le maner eſt, ſi tenant a terme de vie alien en fee, celuy en le reverſion ou celuy en le remainder poit enter ſur l'alienee. Et ſi tiel alienee devie ſeiſie de tiel eſtate ſans continual claime fait a les tenements, devant le morant ſeiſi del alienee, et les tenements per cauſe del morant ſeiſi del alienee diſcendont * a ſon heire, donques ne poit celuy en le reverſion ne celuy en le remainder enter. Mes † ſi celuy en le reverſion ou celuy en le remainder, que ad cauſe d'entre ſur l'alienee, fait continual claime a les tenements devant le morant ſeiſie del alienee, donques tiel home poit enter apres la mort l'alienee, auxy bien come il ‡ puiſſoit en ſa vie §.*

IN the ſame manner it is, if tenant for life alien in fee, hee in the reverſion or he in the remainder may enter upon the alienee. And if ſuch alienee dieth ſeiſed of ſuch eſtate without continuall claime made to the tenements, before the dying ſeiſed of the alienee, and the lands by reaſon of the dying ſeiſed of the alience deſcend to his heire, then cannot he in the reverſion nor hee in the remainder enter. But if hee in the reverſion or in the remainder, who hath cauſe to enter upon the alienee, make continuall claime to the land before the dying ſeiſed of the alienee, then ſuch a man may enter after the death of the alienee, as well as he might in his life-time.

BY

* *a ſon heire,—al heire del alicne*, L. and M. and Roh.

† *ſi* not in L. and M. nor Roh.

‡ *puiſſoit en—poet a*, L. and M. and Roh.

§ *&c.* L. and M.

BY this it appeareth, that a continuall claime may be made as well where the lands are in the hands of a feoffee, &c. by title, as in the hands of a diſſeiſor, abator, or intrudor, by wrong, as before hath beene noted (1).

Sect. 416.

*ITEM, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter a terme de vie, le remainder a la tierce en fee, ſi le tenant a terme de vie aliena a un auter en fee, et celuy en le remainder pur terme de vie fait continual claime a la terre devant le morant ſeiſie d'alienee, et puis l'alienee moruſt ſeiſie, * et puis apres celuy en le remainder pur terme de vie moruſt devaunt aſcun entrie fait per luy, en ceo cas celuy en le remainder en fee poit enter † ſur heire l'alienee, per cauſe de continual claime fait per luy que avoit le remainder pur terme de ſa vie, pur ceo que tiel droit que il averoit d'entre, ‡ alera et remaindra a celuy en le remainder apres luy, entant que celuy en le remainder en fee § ne puiſſoit pas enter ſur l'alienee en fee durant la vie celuy en le remainder pur terme de ‖ ſa vie, et pur ceo ** que il ne puiſſoit adonques faire continual claim. †† (Car nul poit faire continual claim, mes quant il ad title d'entrie, &c.)*

ALSO, if land be let to a man for terme of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continuall claime to the land before the dying ſeiſed of the alienee, and after the alienee dieth ſeiſed, and after he in the remainder for life die before any entrie made by him, in this caſe he in the remainder in fee may enter upon the heire of the alienee, by reaſon of the continuall claime made by him which had the remainder for life, becauſe that ſuch right as hee had of entrie, ſhall goe and remaine to him in the remainder after him, inſomuch as hee in the remainder in fee could not enter upon the alienee in fee during the life of him in the remainder for life, and for that hee could not then make continuall claim. (For none can make continuall claime but when hee hath title to enter, &c.)

"*ALIEN a un auter en fee.*" It is to be obſerved, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record. (1 Roll. Abr. 630.)

In pais, of lands and tenements which lie in livery (whereof *Littleton* intendeth his caſe) where a greater eſtate paſſeth by livery than the particular tenant may lawfully make, whereby the reverſion or remainder is deveſted, as here in the example that *Littleton* putteth when tenant for life alieneth in fee, which must bee underſtood of a feoffment, fine, or recoverie by conſent. Vide Sect. 581. 609, 610, 611. [251. b.]

(1 Rep. 14.)

If tenant for life, and hee in the remainder for life in *Littleton's* caſe, hath joyned in a feoffment in fee, this had beene a forfeiture of 17 El. Dy. 339 16 El. Dy. 324.

* &c. added L. and M. and Roh.
† &c. added L. and M. and Roh.
‡ *ne* in L. and M. and Roh.
§ *que* added in L. and M. and Roh.
‖ *ſa* not in L. and M. nor Roh.
** *que* not in L. and M. nor Roh.
†† *(Car nul poit faire continual claim)* not in L. and M. nor Roh.

(1) [See Note 194.]

of both their eſtates, becauſe hee in the remainder is *particeps injuriæ*. And ſo it is if hee in the remainder for life had entred, and diſſeiſed tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder (1).

33 E. 3. Deriſe 21. 15 E. 4. 9. Vide Sect. 608, 609, 610. (1 Roll. Abr. 854.)

A particular eſtate of any thing that lies in grant cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowſon, rent, common, or of a reverſion or remainder of land, by deed grant the ſame in fee, this is no forfeiture of their eſtates, for that nothing paſſes thereby, but that which lawfully may paſſe; and of that opinion is *Littleton* in our bookes.

(1 Rep. 76. b.)

35 H. 6. 62. Tr. 32 El. in Informat. de intruſion vers Robinſon pur le Manor de Drayton Baſſet, ſo reſolved by the court of exchequer.

But if tenant for life or yeares of land, the reverſion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reverſion or remainder is diveſted out of the king; and the reaſon is, in reſpect of the ſolemnitie of the feoffment by liverie, tending to the king's diſheriſon (2).

(Poſt. 332. b. 1. Leo. 40. 1 Roll. Abr. 855.)

By matter of record, and that by three manner of wayes. Firſt, by alienation. Secondly, by claiming a greater eſtate than he ought. Thirdly, by affirming the reverſion or remainder to be in a ſtranger.

* 15 E. 4. 9. 31 E. 3. Gr. 62. 14 E. 3. 3 Avow. 117.

Firſt, by alienation; and that of two ſorts, *viz.* by alienation diveſting, or not diveſting, the reverſion or remainder. Diveſting, as by levying of a fine, or ſuffering a common recoverie of lands, whereby the reverſion or remainder is diveſted: not diveſting, as by levying of a fine in fee, of an advowſon, rent, common, or any other thing that lieth in grant: and of this opinion is *Littleton* in our bookes *. And ſo note two diverſities: firſt, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree that the reverſion or remainder in neither caſe is diveſted: ſecondly, betweene a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, becauſe the deed is the originall.

15 E. 2. Judg. 237. 6 E. 3. 49. 9 E. 3. 4. 18 E. 2. Fines 130. 15 E. 4. 29. 36 H. 6. 29. 2 H. 6. 9. 4 El. Dy. 9 H. 5. 14.

Secondly, by claime; and that may be in two ſorts, either expreſſe or implyed. Expreſſe, as if tenant for life will in court of record claime fee, or if leſſee for yeares be ouſted, and he will bring an aſſiſe *ut de libero tenemento*. Implyed, as if in a writ of right brought againſt him he will take upon him to joyne the miſe upon the meere right, which none but tenant in fee ſimple ought to doe. So if leſſee for yeares doe loſe in a *præcipe*, and will bring a writ of error, for error in proceſſe, this is a forfeiture (3).

22 Aſſ. 31. 18 E. 3. 28. 16 Aſſ. 16. (Mo. 77. 212. 1 Rep. 16.)

21 E. 3. 14. a. 5 E. 4. 2. 24 H. 8. Forf. Br. 87. li. 2. fol. 55, 56. Buckler's caſe. 27 E. 3. 77. 17 E. 3. 7. a. 39 E. 3. 16. 29 E. 3. 24. 5 Aſſ. 5. 5 E. 3. entr. cong. 42. 14 E. 3.

Thirdly, by affirming the reverſion or remainder to be in a ſtranger, and that either actively or paſſively. Actively, by five manner of wayes. As firſt, if tenant for life pray in aid of a ſtranger, whereby he affirmes the reverſion to be in him. Secondly, if he atturne to the grant of a ſtranger; and there note alſo a diverſitie betweene an atturnement of record to a ſtranger, and an atturnement *in pais*, for an atturnement *in pais* worketh no forfeiture. Thirdly, if a ſtranger bring a writ of entrie *in caſu proviſo*, and ſuppoſe the reverſion to be in him, if the tenant for life confeſſe the action, this is a forfeiture. Fourthly, if tenant for life plead covinouſly, to the diſheriſon of him in the reverſion, this is a forfeiture. [252. a.]

(1) See the obſervations on feoffments introduced in the notes to the next chapter.

(2) See ant. 233. b. note.

(3) [See Note 195.]

forfeiture. Fifthly, if a ſtranger bring an action of waſte againſt leſſee for life, and he plead *nul waſt fait*, this it a forfeiture; or the like. receit 135. 3 E. 3. 32. 24 E. 3. 68. 1 H. 7. 9 Rep. 106.)

(1 Roll. Abr. 852. 3 Rep. 4. b. 1 Leo. 264.

Paſſively, as if tenant for life accept a fine of a ſtranger, *ſur conuſans de droit come ceo, &c.* for hereby he affirmes of record the reverſion to be in a ſtranger (1). 3 Mar. Dy. 148.

Littleton here ſpeaketh of the forfeiture of an eſtate; and here it is to be knowen, that the right of a particular eſtate may be forfeited alſo, and that he that hath but a right of a remainder or reverſion ſhall take benefit of the forfeiture. As if tenant for life be diſſeiſed, and hee levie a fine to the diſſeiſor, he in the reverſion or remainder ſhall preſently enter upon the diſſeiſor for the forfeiture. And ſo it is if the leſſee after the diſſeiſin had levied a fine to a ſtranger, though to ſome reſpects *partes finis nihil habuerunt*, yet it is a forfeiture of his right. Lib. 2. fol. 55. Buckler's caſe.

Littleton here ſpeaketh of an alienation in fee abſolutely, but ſo it is if the leſſee for life make a leaſe for any other man's life, or a gift in taile. If *A.* be tenant for life, and make a leaſe to *B.* for his life, and *B.* dieth, and the leſſee re-entreth, yet the forfeiture remaineth. 13 E. 4. 4.

If tenant for life make a leaſe for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken; yet the forfeiture remaineth. *Littleton* ſpeaketh of an eſtate for life; ſo it is of tenant in taile *apres poſſibilitie*, tenant by the courteſie, tenant in dower, or of him that hath an eſtate to him and his heires, during the life of *I. S.* &c. and ſo of tenant for yeares, tenant by ſtatute merchant, ſtatute ſtaple, or *elegit*. (Ant. 202. b.) 39 Aſſ. 15. 43 E. 3. ent. cong. 30. 2 H. 5. 7. 39 E. 3. 16. 45 E. 3. 25. (Ant. 28. a. 42. a.)

Littleton ſaith, that where the alienation in fee is made to another, which muſt be intended a ſtranger, for if it be made to him in reverſion or remainder, it amounts to a ſurrender of his eſtate, as at large hath beene ſpoken in the chapter of tenant for life.

By *Littleton* it appeareth, that tenant for life in remainder may enter for the forfeiture of the firſt tenant for life, and that if the tenant for life in remainder make continuall claime, and the alienee die ſeiſed, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee ſhall enter, becauſe he in the remainder in fee could not make any claime (2); and therefore the right of entrie, which tenant for life in remainder gained by his entrie (3), ſhall goe to him in the remainder in fee, in reſpect of the privitie of eſtate: and ſo it is of him in the reverſion in fee in like caſe, for he is alſo privie in eſtate. (1 Roll. Abr. 630.)

If two joyntenants be diſſeiſed, and the one of them make continuall claime, and dieth, the ſurvivor ſhall take benefit of his continuall claime in reſpect of the privitie of their eſtate.

But if tenant for life make continuall claime, this ſhall not give any benefit to him in the remainder, unleſſe the diſſeiſor died in the life of tenant for life, for the cauſe abovesaid, *Section* 414.

If tenant in taile, the remainder in fee with warrantie, have judgement to recover in value, and dieth before execution without iſſue,

(1) [See Note 196.]

(2) *i. e* during the life of him in the remainder for life.

(3) The word *entry* appears to be printed in this caſe by miſtake, inſtead of the word *claim*, which the context ſeems to require.

iſſue, he in the remainder ſhall ſue execution, for he hath right thereunto, and is privie in eſtate.

In the ſame manner, if a ſeigniorie be granted by fine to one for life, the remainder in fee, the grantee for life dieth, he in the remainder ſhall have a *per quæ ſervitia*, for he hath right to the remainder, and is privie in eſtate. Here alſo it appeareth, that none can make continuall claime, but he that hath right to enter.

Sect. 417.

*MES eſt a veier a toy (mon fits) coment et en quel manner tiel continual claime ſerra fait: et ceo bien apprender, trois choſes ſont a intender. La 1. choſe eſt, ſi home ad cauſe d'entre en aſcuns terres ou tenements que ſont en divers villes deins un meſme countie, s'il enter en un parcel de les terres ou tenements que ſont en un ville, en noſme de touts ſes terres ou tenements as queux il ad droit d'enter deins touts les villes de meſme le countie; * per tiel entrie il avera auxy bone poſſeſſion et ſeiſin de † touts terres ou tenements dont il ad title d'entrie, ſicome il avoit enter ‡ en fait en cheſcun parcel: et ceo ſemble grand reaſon.*

BUT it is to be ſeene of thee (my ſon) how and in what manner ſuch continuall claime ſhall be made; and to learne this wel, three things are to be underſtood. The firſt thing is, if a man hath cauſe to enter into any lands or tenements in divers townes in one ſame countie, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into the which he hath right to enter within all the townes of the ſame countie; by ſuch entrie he ſhall have as good a poſſeſſion and ſeiſin of all the lands and tenements whereof he hath title of entrie, as if hee had entred in deed into every parcell; and this ſeemeth great reaſon.

(Plo. 355. b. 359. a. 2 Inſt. 518. 3 Rep. 91. 1.) (Poſt. 263. b.)

"*SI home ad cauſe d'entrer en aſcuns terres ou tenements, &c.*" It is not ſufficient to tell one generally what he ſhould doe, but to direct him how, and in what manner he ſhall doe it, as *Littleton* doth in this place. And here, the generall rules of our author are to bee underſtood, that the entrie of a man, to recontinue his inheritance or freehold, muſt enſue his action for recoverie of the ſame. As if three men diſſeiſe me ſeverally of three ſeverall acres of land, being all in one countie, and I enter in one acre, in the name of all the three acres, this is good for no more but for that acre which I entred into, becauſe each diſſeiſor is a ſeverall tenant of the freehold, and as I muſt have ſeverall actions againſt them for the recoverie of the land, ſo mine entrie muſt be ſeverall. [252. b.]

This hath beene adjudged, Mich. 14 & 15 Eliz. Rot. 1458, in the Earl of Arundell's caſe.

And ſo it is if one man diſſeiſe mee of three acres of ground, and letteth the ſame ſeverally to three perſons for their lives, &c. there the entrie upon one leſſee, in the name of the whole, is good for no more than that acre that he hath in his poſſeſſion. But if the diſſeiſor had letten ſeverally the ſaid three acres to three perſons for yeares, there the entrie upon one of the leſſees, in the name

(4 Leo. 8.) (1 Leo. 36.) (1 Roll. Abr. 738.) (1 Leo. 51.)

* *et* added in L. and M. and Roh.
† *touts—tiels*, L. and M. and Roh.
‡ *en fait* not in L. and M. nor Roh.

name of all the three acres, ſhall recontinue and reveſt all the three acres in the diſſeiſee, for that the diſſeiſee might have had one aſſiſe againſt the diſſeiſor, becauſe he remained tenant of the freehold for all the three acres, and therefore one entrie ſhall ſerve for the whole.

If one diſſeiſe me of one acre at one time, and after diſſeiſe me of another acre in the ſame countie at another time, in this caſe mine entrie into one of them in the name of both is good: for that one aſſiſe might be brought againſt him for both diſſeiſins. 7 Aſſ. 18. 12 E. 4. 10. 36 H. 6. 27. 32 Aſſ. pl. 1.

But if I infeoffe one of one acre of ground upon condition, and at another time I infeoffe the ſame man of another acre in the ſame countie upon condition alſo, and both the conditions are broken, an entrie into one acre in the name of both is not ſufficient, for that I have no right to the land, nor action to recover the ſame, but a bare title, and therefore ſeverall entries muſt be made into the ſame, in reſpect of the ſeverall conditions. But an entrie in one part of the land, in the name of all the land ſubject to one condition, is good, although the parcels be ſeverall, and in ſeverall townes. And ſo note a diverſitie betweene ſeverall rights of entrie, and ſeverall titles of entrie, by force of a condition (1). 11 H. 7. 25. Dyer. 16 El. 337.

"*Deins meſme la countie.*" For if the lands lye in ſeverall counties there muſt be ſeverall actions, and conſequently ſeverall entries, as hath beene ſaid.

"*En noſme de tout, &c.*" If one diſſeiſe me of two ſeverall acres in one countie, and I enter into one of them generally, without ſaying, In the name of both; this ſhall reveſt only that acre wherein entrie is made, as hath beene ſaid; and that is proved by our bookes, which ſay, that if I bring an aſſiſe of two acres, if I enter into one hanging the writ, albeit it ſhall reveſt that only acre, yet the writ ſhall abate. 5 H. 7. 7. 4 E. 4. 19. 12 E. 4. 11. a. (Ant. 52. 180. b.) (10 Rep. Lampet's caſe.) (Plo. Com. 91.)

"*Dont il ad title d'entrie.*" Here in a large ſenſe, title of entrie is taken for a right of entrie.

(9 Rep. 136. b.) (Ant. 48, 49, 50. Poſt. 239. a.) (2 Rep. 31.)

[253. a.] Sect. 418.

CAR ſi home voile enfeoffer un auter ſans fait de certaine terres ou tenements que il ad deins pluſours villes en un countie, et il voile liverer ſeiſin al feoffee de parcel de tenements deins un ville en noſme de touts les terres ou tenements que il ad en meſme le ville, et en les auters villes, &c. touts les dits tenements, &c. paſſont per force de le dit livery de ſeiſin a celuy a que tiel feoffement en tiel maner eſt fait, et uncore celuy a que tiel livery

FOR if a man will enfeoffe another without deed of certaine lands or tenements which he hath in many townes in one countie, and he will deliver ſeiſin to the feoffee of parcell of the tenements within one towne in the name of all the lands or tenements which he hath in the ſame towne, and in other townes, &c. all the ſaid tenements, &c. paſſe by force of the ſaid livery of ſeiſin to him to whom ſuch feoffment in ſuch manner is made, and

(1) [See Note 197.]

*livery de ſeiſin fuit fait, n'avoit droit * en touts les terres ou tenements en touts les villes, mes per cauſe de livery de ſeiſin fait de parcel de les terres ou tenements en un ville:* à multò fortiori, *il ſemble bone reaſon que quant home ad title d'enter en les terres ou tenements en divers villes deins un meſme county, devant aſcun entry per luy fuit, que per l'entry fuit per luy en parcel de les terres en un ville, en le noſme de touts les terres et tenements as queux il ad title d'enter deins meſme le countie, ceo † veſt un ſeiſin de touts en luy, et per tiel entry il ad poſſeſſion et ſeiſin en fait, ſicome il avoit enter en cheſcun parcel, &c.*

and yet hee to whom ſuch livery of ſeiſin was made hath no right in all the lands or tenements in all the townes, but by reaſon of the livery of ſeiſin made of parcell of the lands or tenements in one towne: *à multò fortiori*, it ſeemeth good reaſon that when a man hath title to enter into the lands or tenements in divers townes in one ſame county, before entry by him made, that by the entry made by him into parcell of the lands in one towne, in the name of all the lands and tenements to which he hath title to enter within the ſame county, this ſhall veſt a ſeiſin of all in him, and by ſuch entry hee hath poſſeſſion and ſeiſin in deed, as if he had entred into every parcell.

38 E. 3. 11. 38 Aſſ. 23.

THIS is evident, but here is a diverſity betweene a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery of ſeiſin within the view, albeit he might peaceably enter and make actuall livery; and ſo may he ſhew the recognitors in an aſſiſe the view of lands in another county; but a man cannot make an entry into lands within the view where he may enter without any feare (for it is (*) one thing to inveſt, and another to deveſt), as hereafter ſhall be ſaid in the Section next following.

(*) Vid. Sect. next following.

Vid. Sect. 438.

"*A multò fortiori.*" Or *à minore ad majus*, is an argument frequent in our author, and in our bookes, the force of argument in this place ſtanding thus: if it be ſo in a feoffment paſſing a new right, much more it is for the reſtitution of an antient right, as the worthier and more reſpected in law, which holdeth affirmatively, as our author here teacheth us.

The three, (*&c.*) in this Section need no explication.

Sect. 419. [253. b.]

LE ſecond choſe eſt a entender, que ſi home ad title d'enter en aſcuns terres ou tenements, s'il ne oſaſt enter en meſmes les terres ou tenements, ne en aſcun parcel de ceo per doubt de battery, ou per doubt de mayhem, ou per doubt de mort, s'il alaſt et approch auxy pres les tenements come il oſaſt pur

THE ſecond thing to be underſtood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the ſame lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach

* *en—a*, L. and M. and Roh.

† *veſt—eſt*, L. and M. and Roh.

*par tiel doubt, et claime per parol les tenements ejire les ſoens, maintenant per tiel claime, il ad un poſſeſſion et ſeiſin en les tenements, auxy bien come * s'il uſt enter en fait, coment que il n'avoit unque poſſeſſion ou ſeiſin de meſme les † terres ou tenements devant le dit claime.*

approach as neere to the tenements as hee dare for ſuch doubt, and by word claime the lands to bee his, preſently by ſuch claime he hath a poſſeſſion and ſeiſin in the lands, as well as if hee had entred in deed, although hee never had poſſeſſion or ſeiſin of the ſame lands or tenements before the ſaid claime.

HERE is to be obſerved, that every doubt or feare is not ſufficient, for it muſt concerne the ſafety of the perſon of a man, and not his houſes or goods; for if hee feare the burning of his houſes, or the taking away or ſpoiling of his goods, this is not ſufficient, becauſe hee may recover the ſame, or dammages to the value without any corporall hurt. Vide the Sect. preceding. (2 Roll. Abr. 124. 2 Inſt. 483.) 7 E. 4. 21. 39 H. 6. 5.

Again, if the feare do concern the perſon, yet it muſt not bee a vaine feare, but ſuch as may befall a conſtant man; as if the adverſe partie lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him that would enter; and ſo in pleading muſt hee ſhew ſome juſt cauſe of feare, for feare of it ſelfe is internall and ſecret. But in a ſpeciall verdict, if the jurors doe finde that the diſſeiſee did not enter for feare of corporall hurt, this is ſufficient, and ſhall be intended that they had evidence to prove the ſame. *Talis enim debet eſſe metus qui cadere poteſt in virum conſtantem, et qui in ſe continet mortis periculum, et corporis cruciatum. Et nemo tenetur ſe infortuniis et periculis exponere.* (9 Rep. 13.) 39 E. 3. 28. 11 R. 2. tit. dures 2. 12 H. 4. 19, 20. Bract. lib. 2. fol. 16. b. Britton fol. 19.

66. Fleta lib. 3. cap. 7. and lib. 2. cap. 54. 49 E. 3. 14. 14 H. 4. 13. 39 Aſſ. 11. 11 H. 6. 51. 38 H. 6. 27. 39 H. 6. 36. 5. 20 H. 6. 28. 4 E. 4. 17. 12 E. 4. 7. 28 H. 6. 8. 41 E. 3. 9. 11 H. 4. 6. 8 Aſſ. 25. Vid. Sect. 434. W. 2. cap. 49. 13 H. 4. dures 20.

And it ſeemeth that feare of impriſonment is alſo ſufficient, for ſuch a feare ſufficeth to avoid a bond or a deed; for the law hath a ſpeciall regard to the ſafety and liberty of a man. And impriſonment is a corporall dammage, a reſtraint of liberty, and a kind of captivity. But ſee in the Second Part of the Inſtitutes, *W.* 2. *cap.* 49, a notable diverſity betweene a claime or an entry into land, and the avoidance of an act or deed for feare of battery.

"*Per tiel claime il ad un poſſeſſion et ſeiſin, &c.*" Here is to be obſerved, that there be two manner of entries, *viz.* an entry in deed, and an entry in law. An entry in deed is ſufficiently knowne. Vid. Sect. 378. An entry in law is when ſuch a claime is made as is here expreſſed, which entry in law is as ſtrong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon ſuch an entry in law an aſſiſe doth lie, as well as upon an entry in deed, and ſuch an entry in law ſhall avoid a warranty, &c. 11 H. 6. 51. (Poſt. 256. b.)

But here is a diverſity to be obſerved betweene an entry in law and an entry in deed, for that a continuall claime of the diſſeiſee being an entry in law ſhall veſt the poſſeſſion and ſeiſin in him for his advantage, but not for his diſadvantage. And therefore if the diſſeiſee bring an aſſiſe, and hanging the aſſiſe he make continuall claime, Vid. Sect. 442. Pl. Com. 99. in Aſſ. de freſh-force. The parſon of Honylane's caſe.

* *ſi* not in L. and M. nor Roh. † *terres ou* not in L. and M. and Roh.

claime, this ſhall not abate the aſſiſe, but he ſhall recover damages from the beginning; but otherwiſe it is of an entry in deed. See more of this matter after in this chapter, Sect. 422.

Sect. 420. [254. a.]

ET que la ley eſt ticl, il eſt bien prove per un plee d'un aſſiſe en le liver d'aſſiſe, an. 38 E. 3. p. * 32, *le tenor de quel enſuiſt en tiel forme. En le county de* Dorſet, *devant les juſtices, trove fuit per verdict d'aſſiſe, que le plaintiſe que avoit droit per diſcent de heritage d'aver les tenements mis en plaint, al temps del morant ſon anceſter fuit demurrant en le ville ou les tenements fueront,* † *et per parolx claime les tenements enter ſes vicines, mes pur doubt de mort il n'oſa approcher les tenements, mes port l'aſſiſe, et ſur ceſt matter trove, agard fuit que il recovera, &c.*

AND that the law is ſo, it is well proved by a plea of an aſſiſe in the booke of aſſiſes, *an.* 38 *E.* 3. *p.* 32, the tenor whereof followeth in this manner. In the county of *Dorſet*, before the juſtices, it was found by verdict of aſſiſe, that the plaintiff which had right by diſcent of inheritance to have the tenements put in plaint, at the deceaſe of his anceſtor was abiding in the towne where the tenements were, and by paroll claimed the tenements amongſt his neighbours, but for feare of death hee durſt not approach the tenements, but bringeth his aſſiſe, and upon this matter found, it was awarded that he ſhould recover, &c.

38 Aſſ. p. 23. HERE it appeareth that our booke caſes are the beſt proofes what the law is, *Argumentum ab authoritate eſt fortiſſimum in lege*. And for proofe of the law in this particular caſe, *Littleton* here citeth a caſe in 38 E. 3. but it is miſprinted, for the originall, according to the truth, is in the Booke of *Aſſiſes*, 38 E. 3. p. 23, and not *placito* 32, for there be not ſo many pleas in that yeare. And after the example of *Littleton*, booke caſes are principally to be cited for deciding of caſes in queſtion, and not any private opinion, *teſte meipſo*. More ſhall be ſaid of the matter implyed in this Section in the next following.

Sect. 421.

LA tierce choſe eſt a entender deins quèl temps ‡ *et per quel temps le claime que eſt dit continual claime ſervera et aidera celuy que fiſt le claime, et ſes heires. Et quant a ceo eſt aſcavoir, que celuy que ad title d'enter, quant il voiet faire ſon claime, ſi il oſaſt approacher la terre, donques il covient*

THE third thing is to know within what time and by what time the claim which is ſaid continuall claime ſhall ſerve and aid him that maketh the claime, and his heires. And as to this it is to be underſtood, that hee which hath title to enter, when he will make his claime, if hee dare

* p. 32, not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.
‡ *et per quel temps* not in L. and M. nor Roh.

*covient aler a la terre, ou a parcel de ceo, * et faire ſon claime; et ſ'il n'oſaſt approcher la terre pur doubt ou pavor de batterie, ou mayhem, ou mort, donques covient a luy d'aler et approcher auxy pres come il oſaſt vers la terre, ou parcel de ceo, † a faire ſon claime.*

dare approach the land, then he ought to goe to the land, or to parcell of it, and make his claime; and if hee dare not approach the land for doubt or feare of beating, or maiming, or death, then ought hee to goe and approch as neere as hee dare towards the land, or parcell of it, to make his claime.

"*COVIENT a luy d'aller et approcher auxipres, &c.*" By this it ſhould ſeeme, that by the authority of our author, if the diſſeiſee commeth as neere to the land as he dare, &c. and maketh his claime, this ſhould be ſufficient, albeit he be not within the view.

And the great authoritie of the booke * in 9 H. 4. (being by the whole court) is not againſt this; for that caſe is put where there is no ſuch feare, as here our author mentioneth, in him that makes [254. b.] the continuall claime, and then he that makes the continuall claime ought to bee within the view of the land; and therefore the authoritie of this booke, as it is commonly conceived, is not againſt the opinion of our author in the point aforeſaid. But then it is further objected, that the ſaid booke is againſt another opinion of our author in this Section, *viz.* that where there is no feare, &c. hee that maketh a continuall claime * ought to go to the land or to parcell thereof to make his claime, and therefore in that caſe he cannot make a claime within the view of the land. To this it is anſwered, that where a continuall claime ſhall deveſt any eſtate in any other perſon in any lands or tenements, there, as it hath beene ſaid, he that maketh the claime ought to enter into the land, or ſome part thereof, according to the opinion of our author: but where the claime is not to deveſt any eſtate, but to bring him that maketh it into actual poſſeſſion, there a claime within the view ſufficeth; as upon a diſcent, the heire having the freehold in law may claime land within the view to bring himſelfe into actual poſſeſſion, and in that ſenſe is the opinion of *Hull* and the court to be intended. *Et ſic de ſimilibus.* But yet the entry into ſome parcell in the name of the reſidue is the ſureſt way (1).

* 9 H. 4. 8.

* 11 H. 6. 8. agreeth with our author in this point. (3 Rep. 85. Ant. 15. Ant. 245.)

Vid. Sect. 177.

Sect. 422.

ET ſi ſon adverſarie que occupia le terre, moruſt ſeiſie en fee, ou en fee taile, deins l'an et le jour apres tiel claim, per que les tenements diſcendont a ſon fits come heire a luy, uncore poit celuy que fiſt le claime entrer ſur le poſſeſſion le heire, ‡ &c.

AND if his adverſary who occupieth the land, dieth ſeiſed in fee, or in fee taile, within the yeare and a day after ſuch claime, whereby the lands deſcend to his ſonne as heire to him, yet may hee which make the claime enter upon the poſſeſſion of the heire, &c.

"*DEINS*

* *a* added in L. and M. and Roh.
† *a—et*, L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

(1) [See Note 198.]

Vid. Sect. 385. 426. 9 H. 4. 5. 14 H. 4. 36. 7 E. 3. 37. Pl. Com. 356. 357. 367. Mirror, cap. 2. § 18. Britton fol. 45. b. & 126. (Poſt. 262. a.)

"*DEINS l'an et le jour.*" It is to bee obſerved, that the law in many caſes hath limited a yeare and a day to be a legall and convenient time for many purpoſes. As at the common law, upon a fine or finall judgement given in a writ of right, the party grieved had a yeare and a day to make his claime. So the wife or heire hath a yeare and a day to bring an appeale of death. If a villeine remained in antient demeſne a yeare and a day, he is privileged. If a man be wounded or poyſoned, &c. and dieth thereof within the yeare and the day, it is felony. By the antient law if the feoffee of a diſſeiſor had continued a yeare and a day, the entry of the diſſeiſee for his negligence had beene taken away. After judgement given in a reall action, the plaintiffe within the yeare and the day may have a *habere facias ſeiſinam*, and in an action of debt, &c. a *capias*, *fieri facias*, or a *levari facias*. A protection ſhall be allowed but for a yeare and a day, and no longer, and in many other caſes.

(Ant. 130. b.)

Vid. Sect. 385.

But this time of a yeare and a day in caſe of continuall claime is, ſince our author wrote, altered by the ſaid ſtatute of 32 *H.* 8. *ca.* 33, as before it appeareth.

Sect. 423. [255. a.]

*MES en ceſt cas apres l'an et le jour que tiel claime fuit fait, *ſi le pere donques moruſt ſeiſi ademaine procheine apres l'an et le jour, ou †un auter jour apres, &c. donques ne poit celuy que fiſt le claime entrer: et pur ceo ſi celuy que fiſt le claime voit eſtre ſure a touts temps que ſon entre ne ſerra toll per tiel diſcent, &c. il covient a luy que deins l'an et le jour apres le primer claime ‡fait, de faire un auter claime en le forme avantdit, et deins l'an et le jour apres le ſecond claime ‖fait, de faire le tierce claime en meſme le maner, et deins l'an et le jour de le tierce claime de faire un auter claime, et iſſint ouſter, c'eſt aſcavoir, de faire un claime deins cheſcun an et jour procheine apres cheſcun claime fait durant la vie ſon adverſarie, et donques a quecunques temps que ſon adverſarie moruſt ſeiſi, ſon entrie ne ſerra tolle per nul tiel diſcent. Et tiel claime en tiel maner §fait,*

BUT in this caſe after the yeare and the day that ſuch claime was made, if the father then died ſeiſed the morrow next after the yeare and the day, or any other day after, &c. then cannot hee which made the claime enter: and therefore if hee which made the claime will be ſure at all times that his entrie ſhall not be taken away by ſuch diſcent, &c. it behoveth him that within the yeare and the day after the firſt claime made, to make another claime in forme aforeſaid, and within the yeare and the day after the ſecond claime made, to make the third claime in the ſame manner, and within the yeare and the day after the third claime to make another claime, and ſo over, that is to ſay, to make a claime within everie yeare and day next after everie claime made during the life of his adverſarie, and then at what time ſoever

* *ſi nul auter clayme fuiſt fait*, added in L. and M. and Roh.

† *a* added in L. and M. and Roh.

‡ *fait* not in L. and M. nor Roh.

‖ *fait* not in L. and M. nor Roh.

§ *d'eſtre* added in L. and M. and Roh.

fait, eſt pluis commmunement priſe et noſme Continual Claime de luy que fiſt le claime.

ſoever his adverſarie dieth ſeiſed, his entrie ſhall not be taken away by any diſcent. And ſuch claime in ſuch manner made, is moſt commonly taken and named Continuall Claime of him which maketh the claime, &c. *

IT is to be obſerved, that the yeare and the day ſhall bee accounted, as the day whereon the claime was made ſhall be accounted one: as for example, if the claime were made 2. *die Martii*, that day ſhall be accounted for one; for *Littleton* ſaith in the Section next before (after the claime made) and then the yeare muſt end the firſt day of *March*, and the day after is the ſecond day of *March*. Vid. Sect. 385. (Ant. 46. b.)

See for the computation of the yeare, *de anno biſextili*, and of the day naturall and artificiall, and other parts of the yeare, [a] *Bracton*, [b] *Britton*, and [c] *Fleta* excellent matter. [a] Bract. fol. 264. 344. 359. (2 Roll. Abr. 1521.) [b] Britton fol. 209. [c] Fleta lib. 6. cap. 11. Statute de anno Biſextili. 21 H. 3. Dier 17 Eliz. 345.

Sect. 424.

MES uncore en le cas avantdit, lou ſon adverſarie moruſt deins [255. b.] *l'an et la jour procheine apres le * claime, ceo eſt en ley un continual claime, entant que l'adverſarie deins l'an et le jour procheine apres meſme la claime moruſt. Car il ne beſoigne a celuy que fiſt ſon claime de faire aſcun auter claime, mes a quel temps que il † voit deins meſme l'an et jour, &c.*

BUT yet in the caſe aforeſaid, where his adverſarie dieth within the yeare and the day next after the claime, this is in law a continuall claime, inſomuch as his adverſarie within the yeare and the day next after the ſame claime dieth. For hee which made his claime needeth not to make any other claime, but at what time hee will within the ſame yeare and day, &c.

This is evident. Vid. Sect. 414.

Sect. 425.

(Vid. Stat. 32 H. 8. c. 33.)

ITEM, ſi l'adverſarie ſoit diſſeiſie deins l'an et le jour apres tiel claime, et le diſſeiſor ent moruſt ſeiſie deins l'an et le jour, &c. tiel morant ſeiſie ne grievera my celuy que fiſt le claime, mes que il poit enter, &c. Car quecunque ſoit que moruſt ſeiſie deins l'an et le jour procheine apres tiel claime fait, ceo ne grievera my celuy que fiſt le claime, mes que il poit enter,

ALSO, if the adverſarie be diſſeiſed within the yeare and the day after ſuch claime, and the diſſeiſor thereof dieth ſeiſed within the yeare and the day, &c. ſuch dying ſeiſed ſhall not grieve him which made the claime, but that he may enter, &c. For whoſoever hee be that dieth ſeiſed within the yeare and the day after ſuch claim made, this ſhall

* *primer* added L. and M. and Roh.

† *voit* not in L. and M. nor Roh.

enter &c. coment que fueront pluſors morant ſeiſie, et pluſors diſcents deins meſme l'an et le jour, &c.

ſhall not hurt him that made the claime, but that he may enter, &c. albeit there were many dyings ſeiſed, and many diſcents within the ſame yeare and day, &c.

HERE it appeareth, that the continuall claime doth not only extend to the firſt diſſeiſor, in whoſe poſſeſſion it was made, but to any other diſſeiſor that dieth ſeiſed within the yeare and day after the continuall claime made. And whereas our author ſpeaketh of a ſecond diſſeiſor, &c. herein is likewiſe implyed not only abators and intrudors, but the feoffees or donees of the diſſeiſors, abators, or intrudors, and any other feoffee or donee immediate or mediate, dying ſeiſed within the yeare and day, of ſuch continuall claime made.

Sect. 426.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor moruſt ſeiſie deins l'an et le jour prochein apres le diſſeiſin fait, per que les tenements diſcendont a ſon heire, en ceſt caſe l'entrie le diſſeiſee eſt toll, car l'an et le jour que aidroit le diſſeiſee en tiel caſe, ne ſerra pris de temps de title d'entre a luy accrue, mes tantſolement de temps del claime per luy fait en le manner avant dit. Et pur cel cauſe il ſerroit bone pur tiel diſſeiſee pur faire ſon claime † en auxy breve temps que il puiſſoit apres le diſſeiſin, &c.*

ALSO, if a man be diſſeiſed, and the diſſeiſor dieth ſeiſed within the yeare and day next after the diſſeiſin made, whereby the tenements deſcend to his heire, in this caſe the entrie of the diſſeiſee [256. a.] is taken away, for the yeare and day which ſhould aid the diſſeiſee in ſuch caſe ſhall not bee taken from the time of title of entrie accrued unto him, but only from the time of the claime made by him in manner aforeſaid. And for this cauſe it ſhall be good for ſuch diſſeiſee to make his claime in as ſhort time as he can after the diſſeiſin, &c.

32 H. 8. cap. 33. Vide Sect. 385. 422. (Ant. 236. a.)

THIS in caſe of a diſſeiſor is now holpen by the ſtatute made ſince *Littleton* wrote, as hath beene ſaid; for if the diſſeiſor die ſeiſed within five yeares after the diſſeiſin, though there be no continuall claime made, it ſhall not take away the entry of the diſſeiſee, but after the five yeares there muſt be ſuch continuall claime as was at the common law: but that ſtatute extendeth not to any feoffee or donee of the diſſeiſor immediate or mediate, but they remaine ſtill at the common law, as hath beene ſaid.

* *&c.* added L. and M. † *&c.* added L. and M.

Sect.

Sect. 427.

ITEM, ſi tiel diſſeiſor occupia la terre per xl. ans, ou per ‡ pluſors ans, ſans aſcun claime fait per le diſſeiſee, &c. § *et le diſſeiſee per petit ſpace devaunt le mort del diſſeiſor fait un claime en le forme avantdit, ſi iſſint fortunaſt que deins l'an et le jour apres tiel claime le diſſeiſor moruſt, &c. l'entrie le diſſeiſee eſt congeable, &c. Et pur ceo il ſerroit bone pur tiel home que ne fiſt claime, que ad bone title d'entrie‖, quant il oyet que ſon adverſarie gijt languiſhment, de faire ſon claime, &c.*

ALSO, if ſuch diſſeiſor occupieth the lands fortie yeares, or more yeares, without any claime made by the diſſeiſee, &c. and the diſſeiſee a little before the death of the diſſeiſor makes a claime in the forme aforeſaid, if ſo it fortuneth that within the yeare and the day after ſuch claime the diſſeiſor die, &c. the entrie of the diſſeiſee is congeable, &c. And therefore it ſhall bee good for ſuch a man which hath not made claime, and which hath good title of entrie, when hee heareth that his adverſarie lieth languiſhing, to make his claime, &c.

THIS is evident enough, and in reſpect of that which hath beene ſaid, needeth not to be explained.

Sect. 428.

ITEM, ſicome eſt dit en les caſes miſes, lou home ad title d'entre pur cauſe d'un diſſeiſin, &c. meſme la ley eſt lou home ad droit d'entre per cauſe de aſcun auter title, &c.

ALSO, as it is ſaid in the caſes put, where a man hath title of entrie by cauſe of a diſſeiſin, &c. the ſame law is where a man hath right to enter by cauſe of another title, &c.

HERE title is taken in his large ſenſe to include a right.

[256. b.] "*Aſcun auter title, &c.*" Here is implyed abators or intruders, and not only their diſſeiſors, but the feoffees or donees of diſſeiſors, abators, or intruders, or any other ſo long as the entrie is congeable.

Sect. 429.

*ITEM, de les dits * preſidents poies ſcaver (mon fits) deux choſes. Un eſt, lou home ad title d'entre ſur un tenant en le taile, s'il fiſt un tiel claime a la terre, donques eſt l'eſtate taile defeat, car cel claime eſt come entre fait per luy, et eſt de meſme l'effect en ley,*

ALSO, of the ſaid foreſaying thou mayſt know (my ſonne) two things. One is, where a man hath title to enter upon a tenant in taile, if he maketh ſuch a claime to the land, then is the eſtate taile defeated, for this claime is as an entrie made

‡ *plus* added L. and M.
§ *et* not in L. and M.
‖ *&c.* added L. and M.
* *dites precedents* L. and M.

ley, ſicome il fuiſſoit ſur meſmes tenements, et uſt entrer en meſmes les tenements, come devant eſt dit. † *Et donques quant le tenant en le taile immediate puis tiel claime continua ſon occupation en les tenements, ceo eſt un diſſeiſin fait de meſmes les tenements a celuy que fiſt tiel claime,* et ſic per conſequens *le tenant adonques ad fee ſimple.*

made by him, and is of the ſame effect in law as if he had bin upon the ſame tenements, and had entred into the ſame, as before is ſaid. And then when the tenant in taile immediately after ſuch claime continue his occupation in the lands, this is a diſſeiſin made of the ſame tenements to him which made ſuch claime, and ſo by conſequent, the tenant then hath a fee ſimple.

"*Preſidents.*" This ſhould be *precedents*, and ſo is the originall, and this agreeth with the right ſenſe of *Littleton*.

(Ant. 233.) And here it appeareth, that a continuall claime, which is an entrie in law, is as ſtrong as an entrie in deed.

Vide Sect. 650. and 659, &c. "*Title de entrie.*" Here *title de entrie* is taken in the large ſenſe for right of entrie.

Sect. 430.

LE ſecond choſe eſt, que auxy ſovent que il que ad droit d'entre fait tiel claime, ‡ *et ceo nient contriſteant ſon adverſary continua ſon occupation,* § *auxy ſovent l'adverſary fait tort et diſſeiſin a celuy que fiſt le claime. Et pur cel cauſe auxy ſovent poit celuy que fiſt* ‖ *meſme le claime pur cheſcun tiel tort et diſſeiſin fait a luy, aver un briefe de treſpaſſe,* † Quare clauſum fregit, &c. *et recovera ſes damages, &c.*

THE ſecond thing is, that as often as hee which hath right of entrie maketh ſuch claime, and this notwithſtanding his adverſary continue his occupation, ſo often the adverſary doth wrong and diſſeiſin to him which made the claime. And for this cauſe ſo often may [257. a.] hee which makes the ſame claime for every ſuch wrong and diſſeiſin done unto him, have a writ of treſpaſſe, *Quare clauſum fregit, &c.* and recover his dammages, &c.

HEREBY alſo it appeareth, that an entrie in law is equivalent to an entry in deed.

(2 Roll. Abr. 550. 1 Rep. 98. 1 Leo. 302. 20 H. 6. 15. 38 H. 6. 27.) "*Avera breve de treſpaſſe,* quare clauſum fregit, *et recovera ſes damages.*" The diſſeiſee ſhall have an action of treſpaſſe againſt the diſſeiſor, and recover his dammages for the firſt entry without any regreſſe, but after regreſſe he may have an action of treſpaſſe with a *continuando*, and recover as well for all the meane occupation as for the firſt entry. And here note, that *Littleton* doth here include coſts within dammages.

† *Et* not in L. and M. nor Roh.
‡ *et ceo—&c.* L. and M. and Roh.
§ *&c.* added L. and M. and Roh.
‖ *meſme* not in L. and M. nor Roh.
† Quare clauſum fregit, *&c. et recovera ſes damages, &c. ou il poit aver un briefe,* (the beginning of the next Section) not in L. and M. nor Roh. nor in MSS. before mentioned. It may be here obſerved, that the older copies of Littleton are not divided into Sections, which ſeem to have been firſt injudiciouſly marked by Weſt in the edition 1585, though his diviſions have been ſince retained for the convenience of citation.

Sect.

Sect. 431.

OU il poit aver un briefe ſur le ſtatute le roy Richard *le ſecond, fait l'an de ſon raigne* 5. *ſuppoſant per ſon briefe que ſon adverſary avoit entrer en les terres ‡ ou tenements celuy que fiſt le claime, ou ſon entry ne fuit pas done per la ley, &c. et per tiel action il recovera ſes dammages, &c. Et ſi le caſe fuit tiel, que l'adverſary occupiaſt les tenements ove force et armes, ou ove multitude de gents a temps de tiel claime, &c. ‖ immediate apres meſme le claime poit celuy que fiſt le claime pur cheſcun tiel fait aver un briefe de forcible entry, et recovera ſes treble dammages, &c.*

OR he may have a writ upon the ſtatute of *R.* 2. made in the fifth yeare of his reigne, ſuppoſing by his writ that his adverſarie had entred into the lands or tenements of him that made the claime, where his entry was not given by the law, &c. and by this action he ſhall recover his dammages, &c. And if the caſe were ſuch, that the adverſarie occupied the tenements with force and armes, or with a multitude of people at the time of ſuch claime, &c. immediately after the ſame claime may hee which made the claim for every ſuch act have a writ of forcible entry, and ſhall recover his treble dammages, &c. (1)

THIS is the ſtatute of 5 *R.* 2. *cap.* 7. (Doc. Pla. 381.)

34 H. 6. 30. 13 H. 7. 15. 10 H. 6. 14. 2 E. 4. 18. 37 H. 6. 35. 21 E. 4. 5. 74. 13 E. 2. 3. 27 Aſſ. 64. 38 Aſſ. 9. 44 E. 3. 20. 10 H. 7. 27. Keylwey 1. b. 5 R. 2. cap. 7. (F. N. B. 248, 249.)

"*Per tiel action il recovera ſes dammages.*"

This is to be underſtood, that he ſhall recover dammages for the firſt tercious entry, but not for the meane profits in this action, though he made a regreſſe. And here note, that alſo he ſhall recover his coſts of ſuit, *expenſæ litis*, which *Littleton* doth include within theſe words (dammages, &c.). (2 E. 4. 24. b. 9 E. 4. 4. b. 16 H. 7. 6. a.

"*Dammages.*" *Damna* in the common law hath a ſpeciall ſignification for the recompence that is given by the jury to the plaintife or defendant, for the wrong the defendant hath done unto him (2). (2 Inſt. 289. Poſt. 355. b. 10 Rep. 115, 116. 11 Rep. 56.)

"*Multitude.*" One or more may commit a force, three or more may commit an unlawfull aſſembly, a riot or a rout. A multitude here ſpoken of (as ſome have ſaid) muſt be ten or more. *Multitudinem decem faciunt.* And ſo (ſay they) it is ſaid *de grege hominum.* But I could never read it reſtrained by the common law to any certaine number, but left to the diſcretion of the judges (3). (3 Inſt. 176. Hale's Pl. C. 137.) (See ſtat. 1 Geo. 1, c. 4.)

"*Un*

‡ *ou—et*, L. and M. and Roh.

‖ *immediate apres meſme le claime—douques*, L. and M. and Roh.

(1) [See Note 199.]

(2) Some obſervations on the progreſs of our law, with reſpect to damages, coſts, and meſne profits, are to be found in Note 1, fol. 355. b.

(3) [See Note 200.]

" Un briefe de forcible entrie, et recovera ſes treble dammages."

8 H. 6. cap. 9. 3 E. 4. 19. 24. F. N. B. 248. 11 E. 4. 11. b. 6 H. 7. 12. b. 22 H. 6. 37. 19 H. 6. Regiſter 97. 22 H. 6. 57. F. N. B. 249. a. (2 Cro. 17. 19. 81. 148. 151. 199. 214. 633. 639. 1 Roll. Rep. 406. Sid. 97. 149. Noy 136. 1 Cro. 561. 2 Inſt. 289. 4 Inſt. 176. c. 15. 1 Leo. 327.) (15 R. 2. c. 2. 8 H. 6. c. 9. 23 H. 8. c. 15. 31 El. c. 11. 21 Jac. c. 15.)

This writ is grounded upon the ſtatute of 8 *H.* 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force and detaineth it by force. And in this action without any regreſſe the plaintife ſhall recover treble dammages, as well for the meane occupation as for the firſt entry by force of the ſtatute. And albeit he ſhall recover treble dammages, yet ſhall he recover coſts which ſhall be trebled alſo. [257. b.]

One may commit a forcible entry, as hath beene ſaid, in reſpect of the armour or weapons which he hath that are not uſually borne, or if he doe uſe violence, and threats to the terrour of another. And if three or foure goe to make a forcible entry, albeit one alone uſe the violence, all are guilty of force. If the maſter commeth with a greater number of ſervants than uſually attend on him it is a forcible entrie.

It is to be underſtood, that there is a force implied in law, as every treſpaſſe and reſcous and diſſeiſin implieth a force, and is *vi et armis;* and there is an actuall force, as with weapons, number of perſons, &c. and when an entry is made with ſuch actuall force an action doth lie upon the ſaid ſtatute (1). See before more of force and armes, *Sect.* 240.

10 H. 7. 12. 33 H. 6. 20.

Sect. 432.

*ITEM, *il eſt a veier, ſi le ſervant d'un home que ad title d'enter, poit per le commandement ſon maſter faire continual claime pur ſon maſter ou non.*

ALSO, it is to bee ſeene, if the ſervant of a man who hath title to enter, may by the commandement of his maſter make continuall claime for his maſter or not.

This needeth no explication.

Sect. 433.

ET il ſemble que en aſcuns caſes il poit ceo faire; car s'il per ſon commandement vient a aſcun parcel de la terre, et la fait claime, &c. en le noſme ſon maſter, ceſt claime eſt aſſets bone pur ſon maſter, pur ceo que il fait tout ceo que ſon maſter covient faire

AND it ſeemeth that in ſome caſes he may doe this: for if he by his commandement commeth to any parcell of the land, and there maketh claime, &c. in the name of his maſter, this claime is good enough for his maſter, for that he doth all that which his

* *il—icy*, L. and M. and Roh.

(1) [See Note 201.]

faire † ou devoit faire en tiel cas, &c. ‡ *Auxy ſi le maſter dit a ſon ſervant, que il ne oſaſt venir a la terre, ne aſcun parcel de la terre, pur faire ſon claime, &c. et que il ne oſaſt approcher pluis prochein a la terre forſque a tiel lieu appell Dale, et commanda ſon ſervant d'aler a meſme le lieu de Dale, et la faire un claime pur luy, &c. ſi le ſervant iſſint fait, &c. ceo ſemble auxy bone claime pur ſon*

[258. a.] *maſter, ſicome ſon maſter la fuit en* ‖ *proper perſon, pur ceo que le ſervant fiſt tout ceo que ſon maſter oſaſt et devoit faire per la ley en tiel caſe, &c.*

his maſter ſhould or ought to doe in ſuch caſe, &c. Alſo if the maſter ſaith to his ſervant, that hee dares not come to the land, nor to any parcell of it, to make his claime, &c. and that he dare approch no neerer to the land than to ſuch a place called Dale, and command his ſervant to goe to the ſame place of Dale, and there make a claime for him, &c. if the ſervant doth this, &c. this alſo ſeemeth a good claime for his maſter, as if his maſter were there in his proper perſon, for that the ſervant did all that which his maſter durſt and ought to doe by the law in ſuch a caſe, &c.

HERE it appeareth that where the ſervant doth all that which he is commanded, and which his maſter ought to doe, there it is as ſufficient as if his maſter did it himſelfe; for the rule is, *Qui per alium facit, per ſeipſum facere videtur.*

" *Per commandement.*" If an infant or any man of full age have any right of entrie into any lands, any ſtranger in the name and to the uſe of the infant or man of full age may enter into the lands, and this regularly ſhall veſt the lands in them without any commandement, precedent, or agreement ſubſequent. (*) But if a diſſeiſor levy a fine, with proclamation according to the ſtatute, an eſtranger without a commandement precedent, or an agreement ſubſequent within the five yeares cannot enter in the name of the diſſeiſee to avoid the fine. And that reſolution was grounded upon the conſtruction of the ſtatute of 4 *H.* 7. *cap.* 24. But an aſſent ſubſequent within the five yeares ſhould be ſufficient. *Omnis enim ratihabitio retrotrahitur, et mandato æquiparatur*, as hath beene ſaid.

7 E. 3. 69. a. b. 45 E. 3. Releaſe. 28. 45 E. 3. tit. Briefe 589. 20 E. 3. 62. per Thorp. 11 Aſſ. p. 11. 39 Aſſ. p. 18. 10 H. 7. 12. a. 31 H. 8. tit. entr. Cong. et. tit. Fauxifier recovery 29. (*) Lib. 9. fo. 106. a. the Lord Awdleye's caſe.

" *Auxy ſi le maſter dit a ſon ſervant que il ne oſaſt, &c.*" Here it appeareth, that where the ſervant purſueth the commandement of his maſter, and doth all that which his maſter durſt and ought to doe by the law, this is ſufficient. And although the maſter feareth more than the ſervant, or admit that the ſervant hath no feare at all, yet if he goeth as farre as his maſter durſt, and as he commanded, it is ſufficient. And this is implyed in this Section.

† *ou devoit faire* not in L. and M. nor Roh.

‡ *Auxy* not in L. and M. nor Roh.

‖ *ſon* added in L. and M. and Roh.

Sect. 434.

*AUXY, ſi home ſoit cy languiſhant, ou cy decrepyte, que il ne poit per nul maner vener a le terre, ne a aſcun † parcel d'ycel, ou ſi un recluſe ſoit, que ne poit per cauſe de ſon order aler hors de ſa meaſon, ‡ ſi tiel maner ‖ de perſon commaunda ſon ſervant d'aler et faire claime pur luy, et tiel ſervant ne oſaſt aler a le terre, § ne a aſcun parcel de ceo, pur doubt de batery, mayhem, ou mort, ¶ &c. et pur cel cauſe tiel ſervant vient auxy pres a la terre come il oſaſt pur tiel ↓ doubt, et fait ** le claime, &c. pur ſon maſter, il ſemble que tiel claime pur ſon maſter eſt aſſets fort, et bon en ley. Car auterment ſon maſter ſerroit en treſgrand miſchiefe; car il bien poit eſtre que tiel perſon que eſt languiſhant, decrepite, ou recluſe, ne poit trover aſcun ſervant que oſaſt aler a la terre, ne †† aſcun parcel de cel, pur faire le claime pur luy, &c.*

ALSO, if a man be ſo languiſhing, or ſo decrepite, that he cannot by any meanes come to the land, nor to any parcell of it, or if there bee a recluſe, which may not by reaſon of his order goe out of his houſe, if ſuch manner of perſon command his ſervant to goe and make claime for him, and ſuch ſervant dare not goe to the land, nor to any parcell of it, for doubt of beating, mayhem, or death, &c. and for this cauſe the ſervant commeth as nere to the land as he dareth for ſuch doubt, and maketh the claime, &c. for his maſter, it ſeemeth that ſuch claime for his maſter is ſtrong enough, and good in law. For otherwiſe his maſter ſhould bee in a very great miſchiefe; for it may well be that ſuch perſon which is ſicke, decrepit, or recluſe, cannot finde any ſervant which dare go to the land, or to any parcell of it, to make the claime for him, &c.

(Aut. 52. a.) REGULARLY it is true, that where a man doth leſſe than the commandement or authority committed unto him, there (the commandement or authority being not purſued) the act is void. And where a man doth that which he is authoriſed to doe (Hob. 154.) and more, there it is good for that which is warranted, and void (1 Leo. 289.) for the reſt; yet both theſe rules have divers exceptions and limitations (1).

For the firſt, *Littleton* here putteth the caſe where a ſervant doth leſſe than he is commanded, and yet it ſufficeth, for that *Impotentia excuſat legem*; for ſeeing the maſter cannot, and the ſervant dare not, enter into the land, it ſufficeth that he come as neere to the land as he dare.

11 H. 4. 3. 12 Aſſ. 24. 26 Aſſ. 39. (Perk. 38. b. Mo. 280.) If a man makes a letter of attorney to deliver ſeiſin to *I. S.* upon condition, and the attorney delivereth it abſolute, this is void: and ſo ſome hold if the warrant bee abſolute, and hee delivereth ſeiſin upon condition, the liverie is void. [258. b.]

See before Sect. 419. (2 Inſt. 483.) (Aut. 243. b.) "*Pur battery, mayhem, ou mort.*" See the Second Part of the Inſtitutes, *W. 2. cap.* 49, a diverſity betweene the making of an entry or claime, and the avoydance of an act or deed.

"*Auterment*

† *parcel* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.
‖ *de* not in L. and M.
§ *ne—eu*, L. and M. and Roh.
¶ *&c.* not in L. and M. nor Roh.
↓ *doubt—pavour*, in L. and M. and Roh.
** *le—tiel*, in L. and M. and Roh.
†† *a* added in L. and M. and Roh.

(1) [See Note 202.]

"*Auterment le maſter ſerroit en treſgrand miſchiefe.*" *Argumentum ab inconvenienti eſt validum in lege, quia lex non permittit aliquod inconveniens.* And as hath beene often obſerved before, *Nihil quod eſt inconveniens eſt licitum.*

"*Recluſe,*" *Recluſus, Heremita, ſeu Anchorita,* ſo called by the order of his religion; he is ſo mured or ſhut up, *quòd ſolus ſemper ſit, et in clauſurâ ſuâ ſedet;* and can never come out of his place. *Seorſim enim et extra converſationem civilem hoc profeſſionis genus ſemper habitat.* Note here, albeit the recluſe or anchorite be ſhut up himſelfe, ſo as he by his order is not to come out in perſon, yet to avoid a diſcent he muſt command one to make claime, and ſuch a recluſe ſhall always appeare by attorney in ſuch caſes where others muſt appeare in proper perſon. *Impotentia enim excuſat legem.* 46 E. 3. Petition 18. 33 H. 6. 8. 43 E. 3. 8. b. 30. a.

Sect. 435.

MES ſi le maſter de tiel ſervant ſoit de bone ſane, et poit et oſaſt bien aler a les tenements, ou a parcel de ceo, de faire ſon claime, &c. ſi tiel maſter commanda ſon ſervant d'aler a aſcun parcel de la terre a faire claime pur luy, ‖ et quant le ſervant eſt en alant de faire le commandement de ſon maſter, il oye per le voy tielx choſes que il ne oſaſt venir a aſcun parcel de la terre pur faire le claime pur ſon maſter, et pur cel cauſe il vient auxy pres la terre come il oſaſt pur doubt de mort, et la fait claime pur ſon maſter, et en le noſme de ſon maſter, &c. il ſemble que le doubt en le ley en tiel caſe ſerroit, ſi tiel claime
[259. a.] *availera ſon maſter ou nemy, pur ceo que le ſervant ne fiſt tout ceo que ſon maſter al temps de ſon commandement oſaſt faire, &c.* Quære.

BUT if the maſter of ſuch ſervant bee in good health, and can and dare well goe to the lands, or to parcell of it, to make his claime, &c. if ſuch maſter command his ſervant to goe to any parcell of the land to make claime for him, and when the ſervant is in going to doe the commandement of his maſter, he heareth by the way ſuch things as he dare not come to any parcell of the land to make the claime for his maſter, and therefore he commeth as neere to the land as he dare for doubt of death, and there maketh claime for his maſter, and in the name of his maſter, &c. it ſeemeth that the doubt in law in ſuch caſe ſhall be, whether ſuch claime ſhall availe his maſter or not, for that the ſervant did not all that which his maſter at the time of his commandement durſt have done, &c. *Quære.*

THIS continuall claime is void, for that the ſervant doth leſſe than that which is expreſſely commanded, and there is no impotencie or feare in the maſter. (9 Rep. 79.)

‖ *&c.* added in L. and M. and Roh.

Sect. 436.

ITEM, aſcuns ont dit, que lou home eſt en priſon et eſt diſſeiſie, et le diſſeiſor moruſt ſeiſie durant le temps que le diſſeiſee eſt en priſon, per que les tenements diſcendont al heire del diſſeiſor, ils ont dit, que ceo ne noiera my le diſſeiſee que eſt en priſon, mes que il bien poit enter, nient obſtant ſiel diſcent, pur ceo que il ne puiſſoit faire continual claime quant il fuit en priſon.

ALSO, ſome have ſaid, that where a man is in priſon and is diſſeiſed, and the diſſeiſor dieth ſeiſed during the time that the diſſeiſee is in priſon, whereby the tenements deſcend to the heire of the diſſeiſor, they have ſaid, that this ſhall not hurt the diſſeiſee which is in priſon, but that he well may enter, notwithſtanding ſuch a diſcent, becauſe hee could not make continuall claime when he was in priſon.

(1 Roll. Abr. 687.)
9 H. 7. 24.
Pl. Com. 360.
Bracton, lib. 5. fol. 436.
Britton, fol. 116. b.
Fleta, lib. 6. cap. 52. 53, & lib. 6. cap. 7. & 14.

"*QUANT home eſt en priſon et eſt diſſeiſie.*" For if hee bee diſſeiſed when he is at large, and the diſcent is caſt during the time of his impriſonment, this diſcent ſhall binde him. *Excuſatur autem quis quòd clameum ſuum non appoſuerit, ſi tempore litigii in priſonâ detentus fuerit, ita quòd venire non poſſit, nec mittere, quia nulli vertitur in dubium, et ubi eadem ratio et idem jus erit, ideò videtur quòd excuſari debet quis ſi per vim majorem, vel per fraudem, extra priſonam detentus fuerit, ita quòd venire non poſſit nec mittere, dum tamen hoc per certa judicia probari poterit.*

"*Pur ceo que il ne poit faire continual claime quant il fuit en priſon.*" Here is to bee obſerved by the authoritie of *Littleton*, that he is not enforced in this caſe by law to doe it by his ſervant or any other by his warrant or commandement, for things done by deputie are ſeldome well done, but everie man will ſee his owne buſineſſe moſt effectually ſpeeded and performed: and that it may be once ſpoken for all, the reaſon that a man impriſoned ſhall not be bound in this and the like caſes is, for that by the intendment of law he is kept (as it is preſumed in law) without intelligence of things abroad, and alſo that he hath not libertie to goe at large to make entrie or claime, or ſeeke counſell. And ſo note a diverſitie betweene a recluſe who might have intelligence, and a man in priſon.

Pl. Com. 360. in Stowel's caſe.

* Sect. 437.

MES l'opinion de touts les juſtices, p. 11 H. 7. fuit, que ſi le diſſeiſin ſoit avant l'enpriſonment, coment que le morant ſeiſie ſoit il eſteant en le priſon, ſon entrie eſt tolle.

BUT the opinion *of all the juſtices, p. 11 H. 7.* was, that if the diſſeiſin bee before the impriſonment, although the dying ſeiſed be he being in the priſon, his entrie is taken away.

THIS

* This Section is not in L. and M. nor Roh. nor in the edit. 1577, which is eſteemed more correct than the common copies.

THIS is of a new addition, and miſtaken, for there is no ſuch opinion, p. 11 H. 7. but it is, 9 H. 7. fol. 24. b.

*ET auxy, ſi tiel que eſt en priſon ſoit utlage in action de debt ou treſpaſſe, ou en appeale de robberie, &c. il reverſera tiel utlagarie * envers luy pronounce, &c.*

AND alſo, if hee which is in priſon be outlawed in an action of debt or treſpaſſe, or in an appeale of robberie, &c. hee ſhall reverſe this outlawry pronounced againſt him &c.

[259. b.] "*IL reverſera tiel utlagarie.*" *Nota*, the originall is, *reverſera tiel utlagarie per briefe de error* (1), and ſo it would bee amended: for outlawries may bee reverſed two manner of wayes, *viz.* by plea, or by writ of error. By plea, when the defendant commeth in upon the *capias utlagatum*, &c. hee may by plea reverſe the ſame for matters apparent, as in reſpect of a *ſuperſedeas*, omiſſion of proceſſe, variance, or other matter apparent in the record; and yet in theſe caſes ſome hold, that in another terme the defendant is driven to his writ of error.

But for any matters in fact, as death, impriſonment, ſervice of the king, &c. he is driven to his writ of error, unleſſe it be in caſe of felonie, and there *in favorem vitæ* he may plead it.

But albeit impriſonment be a good cauſe to reverſe an outlawrie, yet it muſt be by proceſſe of law *in invitum*, and not by conſent or covin, for ſuch impriſonment ſhall not avoid the outlawrie, becauſe upon the matter it is his owne act.

(Poſt. 260. a. Ant. 128. b.) (F. N. B. 236. 11 Rep. 8.) (2 Roll. Abr. 803, 804. 2 Inſt. 665. 1 Leo. 22. 186.) Mirror cap. 3. Britton, fol. 21. Fleta, lib. 1. cap. 28. & lib. 2. cap. 59. Bracton, lib. 2. 2 E. 4. 1. 4 E. 4. 10. 21 E. 4. 73. 11 H. 7. 5. 21 H. 6. 50. 9 H. 4. 3.

21 H. 6. Utlary 36. 7 H. 6. 27. 21 E. 4. 88. 22 E. 4. 37. 18 E. 3. Villenage 47. 21 E. 4. 37. 33 H. 6. 45, 46. 44 E. 3. Villeine 41. 4 H. 4. 19. 11 H. 4. 34. 3 Eliz. Dyer 192. 2 Eliz. 176. 5 Eliz. ibid. 223. 19 H. 6. 2. 8 H. 6. 37. 37 H. 6. 19. (Doc. Pla. 230. 398.) (Ant. 248. b.) 8 H. 4. 7. 21 H. 7. 13. 10 H. 6. 53. 20 H. 6. 20. 21 H. 6. 55. 22 H. 6. 18. 39 H. 6. 1. 33 H. 6. 51. 45. 38 H. 6. 33. 21 E. 4. 94. 21 H. 7. 33. 5 H. 7. 1. 12 H. 6. 8. 11 H. 6. 67. 19. 1 E. 4. 2. 27 H. 8. 2. 38 Aſſ. pl. 17. Vide Sect. 439.

Sect. 438.

AUXY, ſi un recoverie ſoit † per default vers tiel que eſt en priſon, il avoidera le judgement per briefe de error, pur ceo que il fuit en priſon al temps de le default fait, &c. Et pur ceo que tiels matters de record ne noyeront celuy que eſt en priſon, mes que ils ſerront reverſes, &c. à multò fortiori, *il ſemble que un matter en fait,* ſcilicet, *tiel diſcent ewe quant il fuit en priſon ne luy noyera, &c. ſpecialment*

ALSO, if a recovery bee by default againſt ſuch a one as is in priſon, he ſhal avoid the judgement by a writ of error, becauſe he was in priſon at the time of the default made, &c. And for that ſuch matters of record ſhal not hurt him which is in priſon, but that they ſhall bee reverſed, &c. *à multò fortiori*, it ſeemeth that a matter in fact, *ſcilicet*, ſuch diſcent had when hee was in priſon ſhall

* *per brief d'errour, &c. pur ceo qu'il fuiſt en priſon al temps d'utlagarie,* added L. and M. and Roh. and in MSS.

† *ewe* added L. and M. and Roh.

(1) [See Note 203.]

ment pur ceo que il ne puiſſoit aler hors de priſon pur faire continuall claime, &c.

ſhall not hurt him, &c. eſpecially ſeeing he could not goe out of priſon to make continuall claime, &c.

5 E. 3. 50. b. 7 H. 6. 38.

THIS is evident enough.

Fleta, lib. 6. cap. 67 & 24. Vide W. 2. cap. 48. and the expoſition thereof, 2 part Inſtit. 4 E. 2. Ditcent 51.

"*Per briefe d'error.*" For hee ſhall have no writ of diſceit, becauſe the ſummons was according to the law of the land, by ſummoners and veiors, and the land taken into the king's hand by the pernor.

Bracton, lib. 5. tract. 3. Fleta, lib. 6. cap. 7. 14. 3 H. 6. 46. 38 E. 3. 5. 31 H. 6. Barre. 66. 12 H. 4. 13. 50 E. 3. 9. 3 H. 6. 48. 2 H. 4. 8. 5 H. 7. 3. F. N. B. 17. Bract. lib. 4. fol. 367. 369. Glan. lib. 1. cap. 8. 28 H. 6. 11. 4 H. 5. Challenge 153. Br. Saver. Def. 45. (Cro. Eliz. 506.)

"*Default.*" *Default* is a French word, and *defalta* is legally taken for non-appearance in court. There bee divers cauſes allowed by law for ſaving a man's default; as, firſt, by impriſonment, whereof *Littleton* here ſpeaketh. 2. *Per inundationem aquarum.* 3. *Per tempeſtatem.* 4. *Per pontem fractum.* 5. *Per navigium ſubſtractum per fraudem petentis, non enim debet quis ſe periculis et infortuniis gratis exponere, vel ſubjaccre.* 6. *Per minorem ætatem.* 7. *Per defenſionem ſummonitionis per legem.* 8. *Per mortem attornati ſi tenens in tempore non novit.* 9. *Si petens eſſoniatus ſit.* 10. *Si placitum mittatur fine die.* 11. *Per breve de warrantiâ diei.* But ſickneſſe (as one holds) is no cauſe of ſaving a default, becauſe it may be ſo artificially counterfeited, that it cannot be knowne.

Glanvil. lib. 8. cap. 8. Bracton lib. 3. fol. 156. Britton in proemio & cap. 27.

"*Record.*" (1) *Recordum*, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of juſtice which hath power to hold plea according to the courſe of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of perſonall actions, whereof the debt or dammage amounts to fortie ſhillings or above, which wee call Courts of Record, and are created by parliament, letters patents, or preſcription. [260. a.]

Cicero. Virgil. Pl. Com. 79. b. Mich. 7 & 8 Eliz. Dier 242. 17 E. 3. 49. 37 H. 6. 21. b. 11 H. 4. 26. b. 21 H. 6. 34. Error. Br. 73. 7 H. 7. 4 19 Aſſ. 7 lib. 4. fol. 52. in Rawlin's caſe. Glanvil. lib. 8. cap. 8. Bracton, lib 3. fol. 156. Britton, cap. 27. lib. 6. fol. 11. Lentleman'scaſe, and 50. 45. lib. 7. fol. 30.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is ſaid, *quòd dicere nihil aliud eſt quàm recordari;* and in the ſame ſenſe the poet uſeth it, *ſi rite audita recordor.* But legally records are reſtrained to the rolles of ſuch only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *ſecundum legem et conſuetudinem Angliæ.* And the rolles being the records or memorialls of the judges of the courts of record, import in them ſuch incontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if ſuch a record be alleaged, and it be pleaded that there is no ſuch record, it ſhall be tried only by it ſelfe: and the reaſon hereof is apparent, for otherwiſe (as our old authors ſay, and that truly) there ſhould never be any end of controverſies, which ſhould be inconvenient. Of courts of record you may read in my Reports: but yet during the terme wherein any judiciall act is done, the record remaineth in the breſt of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges ſhall direct; but when that terme is paſt, then the

(1) [See Note 204.]

the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie. lib. 8. fol. 60. b. and 67. a. 7 H. 6. 28. 19 H. 6. 9.

If a grant by letters patents under the great ſeale be pleaded and ſhewed forth, the adverſe party cannot plead *nul tiel record*, for that it appeares to the court that there is ſuch a record; but inaſmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore he may plead *non conceſſit*, and prove in evidence that the king had nothing in the thing granted, or the like, and ſo it was adjudged. But to return to *Littleton*: What then? ſhall a man that is in priſon be privileged from ſuits or outlawries? Nothing leſſe; for if the tenant or defendant be in priſon, he ſhall upon motion, by order of the court, be brought to the barre, and either anſwer according to law, or elſe the ſame being recorded, the law ſhall proceed againſt him, and he ſhall take no advantage of his impriſonment. (Doc. Pla. 307, 308. 1 Leo. 65.) 18 Eliz. Dier 353. 3 Mar. Di. 129. Pl. Com. 232. Seignior Berkeley's caſe. 16 H. 7. 11. b. 22 H. 8. Record. Br. 65. 39 H. 6. 4. 3 Eliz. Dier 187. lib. 6. fol. 15. Eden's caſe. Mich. 31 & 32 El. Rot. 365. In Bankle Roy, inter Eden, & Franklyn & Browne. (4 Rep. Hind's caſe.) 7 H. 6. 38. 8 H. 6. 16. Vide Sect. 418.

"A multò fortiori." Here is an argument, *à minori ad majus*, and the force of our author's argument is this: If a man in priſon ſhall not be bound by a recoverie by default for want of anſwer in court of record in a reall action, which is matter of record (the height and ſtrength whereof hath beene ſomewhat touched) *à multò fortiori*, a diſcent in the countrey, which is matter of deed, ſhall not for want of claime binde him that is in priſon. And as the argument *à minori ad majus* doth ever hold (as our author hath alreadie told us) affirmatively, ſo the argument *à majori ad minus* doth ever hold negatively, as our author here teacheth us; and the reaſon hereof is this, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*

"*Pur ceo que il ne poit aler hors de priſon, &c.*" By this it appeareth, that a man in priſon by proceſſe of law ought to be kept *in ſalvâ et arctâ cuſtodiâ*, and by the law ought not to goe out, though it be with a keeper, and with the leave and ſufferance of the gaoler: but yet impriſonment muſt be, *cuſtodia, et non pœna; for carcer ad homines cuſtodiendos, non ad puniendos dari debet.*

Sect. 439.

*EN meſme le manner il ſemble, lou home eſt hors du royalme en ſervice le roy, pur beſoigne del royalme, ſi tiel * home ſoit diſſeiſie quant il eſt en ſervice le roy, † et le diſſeiſor moruſt ſeiſie, le diſſeiſee eſteant en le ſervice le roy, que tiel diſcent ne grieveroit le diſſeiſee; mes pur ceo que il ne puiſſoit faire continual claime, ‡ il ſemble a eux, que quant il ‖ vient en Engleterre, il poit enter ſur l'heire le diſſeiſor,*

IN the ſame maner it ſeemeth, where a man is out of the realme in the king's ſervice, for the buſineſſe of the realme, if ſuch a one be diſſeiſed when hee is in ſervice of the king, and the diſſeiſor dieth ſeiſed, &c. the diſſeiſee being in the king's ſervice, that ſuch diſcent ſhall not hurt the diſſeiſee; but for that hee could not make continuall claime, it ſeemes to them, that when hee commeth

* *home* not in L. and M.

† *et le diſſeiſor moruſt ſeiſie, le diſſeiſee eſteant en le ſervice le roy*, not in L. and M.

‡ *&c.* added in L. and M. and Roh.

‖ *revient*, L. and M.

diſſeiſor, &c. Car tiel home reverſera un utlagarie ‡ pronounce envers luy durant le temps que il fuit en le ſervice le roy, &c. ergo, à multò fortiori, *avera aid et indempnitie per la ley en l'auter caſe, &c.*

commeth into England, he may enter upon the heire of the diſſeiſor, &c. For ſuch a man ſhal reverſe an outlawrie pronounced againſt him during the time that hee was in the king's ſervice, &c. therfore, *à multò fortiori*, he ſhall have aid and indemnitie by the law in the other caſe, &c.

6 R. 2. Protect. 46. Vide Sect. 198. 440, 441. (Cro. Car. 365. 5 Rep. Conſtable's caſe. 1 Roll. Abr. 528.)

"*HORS du royalme*," *(id eſt) extra regnum;* as much to ſay, as out of the power of the king of England as of his crowne of England: for if a man be upon the ſea of England, he is within the kingdom or realme of England, and within the ligeance of the king of England, as of his crowne of England. And yet *altum mare* is out of the juriſdiction of the common law, and within the juriſdiction of the lord admirall, whoſe juriſdiction is verie antient, and long before the reigne of *Edward* the third, as ſome have ſuppoſed, as may appeare by the lawes of *Oleron*, (ſo called, for that they were made by king *Richard* the firſt when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of *Henrie* the third, *Edward* the firſt, and *Edward* the ſecond, is moſt manifeſt. [260. b.]

Rot. { 8 H. 3. / Pat. { 9 H. 3. / 15 H. 3. Temps E. 1. Avowrie 192. Rot. Vaſcon. 22 E. 1. m. 8 Pat. 23 E. 1. 1 pars. Pat. 10 E. 2. 8 E. 2. Coron. 399. Stanf. Pl. Coron. 51.

Vide Sect. 677. (Hob. 212.)

See hereafter in another caſe, which *Littleton* put in his chapter of Remitter; there he ſaith, *ouſter le mere*, beyond the ſea. This great officer in the Saxon language is called *Aen mere al, (i. e.)* over all the ſea, *præfectus maris, ſive claſſis, archithalaſſus:* and in antient time the office of the admiraltie was called *cuſtodia marinæ Angliæ*, or *maritimæ Angliæ*.

3 R. 3. Cont. Claime 13. 4 E. 3. 46.

And note *Littleton* ſaith not, beyond the ſea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by conſtruction to be within the realme of England, or the dominions of the ſame.

But here a queſtion may be demanded, What if a man be out of the realme, and a recoverie is had againſt him in a *præcipe* by default, whether ſhall he avoid it in a writ of error, as well as he ſhould doe the outlawrie, or if he had beene impriſoned at the time of ſuch recoverie by default? And it ſeemeth that he ſhall not avoid the recoverie, for by that meanes a man might be infinitely delayed of his freehold and inheritance whereof the law hath ſo great a regard. And few or none goe over, but it is either of their owne free will, or by ſuit, for what cauſe ſoever; and he is not in that caſe without his ordinarie remedie, either by his writ of higher nature, or by a *quòd ei deforceat*. But outlawrie in a perſonall action ſhall be avoided in that caſe, *quia de minimis non curat lex*, and otherwiſe he ſhould be without remedie. See Section 437, and note the diverſitie betweene that caſe of the impriſonment, and this of being beyond ſea. And *Littleton* putteth the caſe of impriſonment, and omitteth the being beyond ſea here: neither have I ſeene

‡ *que eſt* added L. and M.

I ſeene any booke to warrant, that he that is beyond ſea ſhall in this caſe avoid the recoverie by default.

" *En ſervice le roy.*" *Bracton* ſheweth, that the exception of being beyond ſea is, *quia fuit in ſervitio domini regis ultra mare*, viz. *apud talem locum*, and that caſe is cleere: but you ſhall heare the opinion of *Bracton* in the next Section, where hee is not in the ſervice of the king. Bract. lib. 5. fol. 436.

Sect. 440.

*ITEM, auters ont dit, que ſi aſcun ſoits hors du royalme, coment que il ne ſoit en ſervice le roy, ſi tiel home eſteant hors de le royalme eſt diſſeiſee en terres ou tenements deins le royalme, et le diſſeiſor devy ſeiſie, &c. le diſſeiſee eſteant hors du royalme, il ſemble a eux, que quant le diſſeiſee vient deins le royalme, que il poit * enter ſur l'heire le diſſeiſor, et ceo ſemble a eux per deux cauſes. Un eſt, que celuy que eſt hors du royalme ne poit aver conuſans del diſſeiſin fait a luy per entendement de ley, nient pluis que choſe fait hors du royalme poit eſtre try deins le royalme per le ſerement de 12. † et de compeller tiel home per la ley de faire continuall claime, lequel per l'entendement de le ley ne puit aver aſcun notice ou conuſance de tiel diſſeiſin, ceo ſerra inconvenient, et noſmement quant tiel diſſeiſin eſt fait a luy quant il eſt hors du royalme, et auxy le morant ſeiſie fuit quant il fuit hors du royalme: car en tiel caſe il ne poit per nul poſſibility ſalonque common preſumption faire continual claime; mes auterment ſerroit ſi tiel diſſeiſee fuit deins le royalme al temps de le diſſeiſin, ou al temps del morant del diſſeiſour.*

ALSO, others have ſaid, that if a man bee out of the realme, though hee bee not in the king's ſervice, if ſuch a man being out of the realme be diſſeiſed of lands or tenements within the realme, and the diſſeiſor die ſeiſed, &c. the diſſeiſee being out of the realme, it ſeemeth unto them, that when the diſſeiſee commeth into the realme, that he may well enter upon the heire of the diſſeiſor, &c. and this ſeemeth unto them for two cauſes. One is, that hee that is out of the realme cannot have knowledge of the diſſeiſin made unto him by underſtanding of the law, no more than that a thing done out of the realme may bee tried within this realme by the oath of 12 men; and to compell ſuch a man to make continuall claime, which by the underſtanding of the law can have no knowledge or conſance of ſuch diſſeiſin made or done, this ſhall be inconvenient, namely, when ſuch a diſſeiſin is done unto him when he was out of the realme, and alſo the dying ſeiſed was done when he was out of the realme: for in ſuch caſe he may not by poſſibilitie after the common preſumption make continuall claime; but otherwiſe it ſhould be if the diſſeiſee were within the realme at the time of the diſſeiſin, or at the time of the dying ſeiſed of the diſſeiſor.

AND herewith the antient law of England is agreeable with *Littleton*, and the law at this day. So as it is *vetus & conſtans opinio: Excuſatur etiam quis quòd clameum non apposuerit*, [261. a.] Bract. lib. 5. fol. 436. b. & 163. Brit. fol. 21. 216, 217. Flet. lib. 6. cap. 52, 53

* *bien* added in L. and M. and Roh.

† *&c.* added in L. and M. and Roh.

13 H. 4. Triall 6. 9 H. 4. 3. 21 H. 6. Error 27. *fuerit, ut ſi toto tempore litigii fuit ultra mare quâcunque occaſione.* And this is alſo agreeable with our yeare bookes (1). 33 H. 6. 1. 21 H. 6. 34. 26 H. 8. cap. 18. 5 & 6 E. 6. cap. 11.

42 E. 3. 2 & 3. Vide Sect. 102. (Ant. 74. a.) (4 Inſt. 123.) 1 H. 4. cap. 14. 13 H. 4. f. 4. 48 E. 3. 2 & 3. "*Nient pluis que choſe fait hors del royalm poet eſte trie deins le royalm per le ſerement de* 12." And in this rule of law there is warily and truly put by *Littleton*, theſe words, *(by the oath of twelve men)* meaning by a jury. For by certificate a thing done beyond ſea may be tried, as *Littleton* himſelfe, *Sect.* 102, hath ſet downe. And all matters done out of the realme of England concerning war, combate, or deeds of armes, ſhall bee tried and termined before the conſtable and marſhall of England, before whom the triall is by witneſſes, or by combate, and their proceeding is according to the civill law, and not by the oath of twelve men, as *Littleton* here ſpeaketh.

(Doc. Pla. 209.) This rule here rehearſed by *Littleton*, is worthy of explication. If an alien (for example borne in France) bring a reall action, and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leigeance of the king of England; ſhall this caſe want triall becauſe the matter alleaged is out of the realme? then by the fiction of this plea, no demandant ſhall recover; therefore in this caſe the demandant ſhall reply, that hee was borne at ſuch a place in England, within the king's leigeance, and hereupon a jury of 12. ſhall bee charged, and if they have ſufficient evidence that hee was borne in France, or in any other place out of the realme, then ſhall they finde that hee was borne out of the king's alleageance; and if they have ſufficient evidence that he was borne in *England*, or *Ireland*, or *Jernſey*, or *Jerſey*, or elſewhere within the king's obedience, they ſhall finde that he was born within the king's leigeance. And this hath ever beene the pleading and manner of triall in that caſe. And ſo it is in the caſe that *Littleton* here putteth, if a man, in avoydance of a fine or a diſcent, alleage that he was out of this realme in Spaine, at the time of levying of the fine, and at the time of the diſſeiſin and diſcent, the adverſe party may alleage that he was at ſuch a place in England, &c. whereupon iſſue ſhall be taken, and then in evidence he may prove that he was out of the realme, &c. which, upon ſufficient evidence, the jurie ought to finde. And in both theſe caſes and the like, in a ſpecial verdict the jury may finde that he was borne beyond ſea, or was beyond ſea at that time, &c.

20 E. 3. averment, 34. 27 Aſſ. 24. 32 H. 6. 25. 15 E. 4. 15. 7 H. 6. 15. 1 R. 3. 4. 6 H. 7. 6. 7 H. 7. 8. F. N. B. 196. 29 Aſſ. 11. 13 E. 1. mord. 47. 12 H. 3. ibid. 55. Lib. 7. fol. 26, 27. Calvin's caſe. Li. 6. f. 47. Dowdale's caſe. [261. b.]

(7 Rep. 26, 27. Calv. caſe.) The ſtatute of 25 *E.* 3, *de proditionibus*, doth declare, that it is treaſon by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he ſhall forfeit all his lands, &c. A man muſt not imagine that ſeeing by the common law declared by authority of parliament, that adhering to the king's enemies without the realme, is high treaſon, and that the delinquent may be attainted thereof, &c. that this ſhould want triall, for then the judgement of the common law, and declaration of the parliament, ſhould be illuſory, which no well adviſed man will thinke in a matter of ſo great conſequence. But certaine it is, that for neceſſitie ſake, the adherencie without the realme muſt be alleaged in ſome place within

(1) [See Note 205.]

within England. And if upon evidence they ſhall finde any adherencie out of the realme, they ſhall finde the delinquent guilty. But moſt commonly they indited him (if he had lands) in ſome county where his lands did lie, that were to be forfeited; and this, as appeareth in our bookes, was the common uſe. And ſo it is declared by the ſtatute (*) of 35 *H.* 8. and that it ſhall be tried by twelve men of the countie, where the king's bench ſhall ſit, and be determined before the juſtices of that bench, or elſe before ſuch commiſſioners, and in ſuch ſhire of the realme, as ſhall be aſſigned by the king's majeſtie's commiſſion, and this ſtatute for this point remaines in force at this day, and ſo it was reſolved [*a*] by all the judges in my time, *viz.* in 33 *Eliz.* in the caſe of *Orurcke*. And *anno* [*b*] 34 *Eliz.* in ſir *John Perot*'s caſe done in Ireland, for that is out of the realme of England, and the caſe [*c*] in *Mich.* 19 & 20 *Eliz.* was utterly denied, and ſir *Chriſtopher Wray* himſelfe (who is ſuppoſed to give his opinion in that caſe) proteſted that he never gave any ſuch opinion, but did hold the contrary. When part of the act, eſpecially the originall, is done in England, and part out of the realme, that part that is to be performed out of the realme, if iſſue be taken thereupon, ſhall be tried here by 12 men; and thoſe twelve men ſhall come out of the place where the writ is brought. For example, (which ever doth illuſtrate) it was covenanted by indenture, by charter party, that a ſhip ſhould ſayle from *Blackney* haven in Norfolke, to *Muttrel* in Spaine, and there remaine by certaine dayes.

5 R. 2. triall 54.

(*) 35 H. 8. cap. 2. Staunford. pl. cor. 90. (Cro. Car. 332.)

[*a*] 33 Eliz. caſe Orurke.

[*b*] 34 Eliz. caſe de Sir John Perots.

[*c*] Mich. 19 & 20 Eliz. Dier 360. (20 H. 6. 8.) 48 E. 3. 3. 11 H. 7. 16. 1 R. 3. 4.

In an action of covenant brought upon this charter party, the indenture was alleaged to be made at *Thetford* in the county of Norfolke, and upon pleading, the iſſue was joyned, whether the ſaid ſhip remained at *Muttrel* in Spaine by the ſaid certaine dayes. And it was adjudged that this iſſue ſhould be tried at *Thetford*, where the action was brought, becauſe there the contract tooke his originall by making of the charter partie, and ſo hath it beene often adjudged in ſuch like caſe.

(1 Roll. 532. Hob. 11. 4 Inſ. 138. 140, 141. 7 Rep. 2. a. Sid. 367. Lut. 700. 710. 950.) Paſch. 28 Eliz. in action de covenant inter Evangeliſt Conſtantine pl. & Hughgyn defendant in the king's bench.

An obligation made beyond the ſeas may be ſued here in England, in what place the plaintife will. What then if it beare date at *Bourdeaux* in *France*, where ſhall it be ſued? And anſwer is made, that it may be alleaged to be made *in quodam loco vocat' Burdeaux* in *France*, in *Iſlington* in the county of *Middleſex*, and there it ſhall be tried, for whether there be ſuch a place in *Iſlington* or no, is not traverſable in that caſe. Theſe points are neceſſary to be knowne in reſpect of the variety of opinions in our bookes. And of theſe thus much ſhall ſuffice, and now is *Littleton* worthy to be heard.

Li. 6. f. 47. Dowdale's caſe, Vid. 32 H. 6. 25. 48 E. 3. 3. 11 H. 7. 16. 2 E. 2. obligation 15. (2 Cro. 76. Sid. 228 Hob. 11.)

"*Per entendement de le ley.*" *Vide*, for intendement of law, *Sect.* 99, 100. 110. 293. 377, 393, 406, 367, 462, 463, &c. 439. Entendement de le ley.

"*Ceo ſerra inconvenient.*" Here alſo, as hath beene often ſaid, appeareth, that *argumentum ab inconvenienti*, is ſtrong in law. Vide Sect. 269.

"*Auterment eſt ſi le diſſeiſee fuit deins le royalme al temps del diſſeiſin, &c.*" So as if a man be diſſeiſed before he goeth over ſea, or commeth into the realme againe before the diſcent, the diſcent ſhall take away his entrie.

Sect. 441. [262. a.]

UN auter matter ills allegeont pur prover que devant le ſtatute fuit en le temps de roy E. 3. an * 34. cap. 16. *de ſon raigne, per quel eſtatute nonclaime eſte ouſte, &c. le ley fuit tiel, que ſi un fine ſoit levy de certaine terres ou tenements, ſi aſcun que fuit eſtrange al fine avoit droit d'aver et recover meſmes les terres ou tenements, s'il ne venuſt et fiſt ſon claime a ceo deins l'an et le jour procheine apres le fine levie, il ſerra barre a touts jours,* quia dicebatur, finis finem litibus imponebat. *Et que la ley fuit tiel, il eſt prove per l'eſtatute de Weſtminſter* 2. De donis conditionalibus, *lou il eſt parle que ſi fine ſoit levie de les tenements en taile, &c.* quòd finis ipſo jure ſit nullus, nec habeant hæredes, aut illi ad quos ſpectat reverſio (licet fuerint plenæ ætatis in Angliâ, et extra priſonam) neceſſitat' apponere clameum ſuum, † &c. *Iſſint ceo prove, que ſi un eſtrange home que avoit droit a les tenements, s'il fuit hors de royalme al temps del fine levie, &c. n'avera dammage, coment que il ne fiſt ſon claime, &c. coment que tiel fine fuit matter de record: per greinder reaſon il ſemble a eux, que un diſſeiſin et diſcent que eſt matter en fait, ne iſſint trope grecvera celuy que fuit diſſeiſie quant il fuit hors du royalme al temps de diſſeiſin, et auxy al temps que le diſſeiſor moruſt ſeiſie, &c. mes que il bien poit enter, nient contriſteant tiel diſcent* ‡.

ANOTHER matter they alleage for a proofe that before the ſtatute of king *Edward* the Third, made the 34th yeare of his reigne, by which ſtatute non-claim is ouſted, &c. the law was ſuch, that if a fine were levied of certaine lands or tenements, if any that was a ſtranger to the fine had right to have and to recover the ſame lands or tenements, if he came not and made his claime thereof within a yeare and a day next after the fine levied, he ſhall be barred for ever, *quia dicebatur quòd finis finem litibus imponebat.* And that law was ſuch, it is proved by the ſtatute of Weſt. the 2. *De donis conditionalibus,* where it is ſpoken if the fine bee levied of tenements given in the taile, &c. *quòd finis ipſo jure ſit nullus, nec habeant hæredes, aut illi ad quos ſpectat reverſio (licet plenæ ætatis fuerint in Angliâ, et extra priſonam) neceſſitat' apponere clameum ſuum.* Soe it is proved that if a ſtranger that hath right unto the tenements, if he were out of the realme at the time of the fine levied, &c. ſhall have no dammage, though that hee made not his claim, &c. though that ſuch fine was matter of record: by greater reaſon it ſeemeth unto them, that a diſſeiſin and diſcent that is matter in deed, ſhall not ſo grieve him that was diſſeiſed when he was out of the realme at the time of that diſſeiſin, and alſo at the time that the diſſeiſor died ſeiſed, &c. but that he may well enter, notwithſtanding ſuch diſcent.

34 E. 3. cap. 16. (Ant. 254. b.) 4 H. 7. cap. 24. See as well this ſtatute as the ſtatute of 32 H. 8.

HERE it appeareth, what the common law was before the ſaid ſtatute, for non-clayme upon a fine levied. But now ſince *Littleton* wrote, by the ſtatute of 4 *H.* 7, five yeares after proclamations made upon the fine are given to him that right hath to make his claime, or purſue his action, where the common law gave him

* 34. *cap.* 16. not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.

him but a yeare and a day. But this ſtatute of 4 *H.* 7. extends only to fines, and not to non-claime upon a judgement in a writ of right, and therefore the ſaid ſtatute of 34 *E.* 3. here cited by *Littleton*, which ouſteth non-claime only to fines levied, extendeth not to a judgement in a writ of right at this day, and therefore the common law in that caſe remaineth to this day, viz. that claime muſt bee made within a yeare and a day after judgement (1). Alſo if a fine be levied without proclamations, or without ſo many as the law requireth, then the ſtatute of non-claime doth extend to ſuch a fine.

cap. 36. well expounded in my Reports. Lib. 3. fol. 84, 85, &c. caſe del fines per totum. lib. 1. fol. 96, 97. in Shelleye's caſe. lib. 2. fol. 93. Bingham's caſe. lib. 8. fol. 100. Lechford's caſe. Lib. 9. fol. 139, 140, 141. Beaumond's caſe. Lib. 10. fol. 49. b. Lampot's caſe, and 99. a. Lib. 9. fol. 105, 106. Margaret Podger's caſe. Lib. 5. fol. 124. Saffyn's caſe. Lib. 10. 96, 97. Seymour's caſe. Lib. 8. fol. 72. Groſleye's caſe. Lib. 11. fol. 69. 71. 78. Pl. Com. in Smith's and Stapl. caſe, and in Stowe's caſe, and Howel's caſe, and Glanvil. li. 13. cap. 11. Bract. 435. Fleta, lib. 6. cap. 53. Brit. 216. (4 H. 7. c. 24. 32 H. 8. c. 36. 2 Cro. 101. 226.)

"*Dicebatur finis, quia finem litibus imponebat.*" (2) Here you may obſerve the etymologie of a fine. And herewith agreeth [*a*] antiquity: *Finis ideò dicitur finalis concordia, quia imponit finem litibus.* And after the example [*b*] of *Littleton*, it is good to ſearch out the etymologie or right derivation of words; for *ignoratis terminis ignoratur et ars*, as hath beene often obſerved in other places. And the civilians call this judiciall concord, *tranſactionem judicialem de re immobili.*

[*a*] Glanvil. lib. 8. cap. 3. Bract. lib. 5. fol. 435. Fleta, lib. 6. cap. 52, 53.

[*b*] Etymologies, &c. Vid. Sect. 74. 174. 194. 441. 520. 592.

[262. b.] "*Licet fucrit plenæ ætatis in Anglid, et extra priſonam.*" In this act of 13 E. 1. *De donis conditionalibus* is one omitted, who is added in the ſtatute *De modo levandi fines, viz. et ſanæ memoriæ.* [*c*] But a feme-covert had no privilege of non-claime at the common law, as ſome have ſaid, becauſe ſhe had a huſband that might make claime for her. But yet *Bracton* ſaith, *Item excuſatur uxor quæ ſub poteſtate viri ſuppoſita, quòd clameum non appoſuerit licet mittere poſſit*, and citeth a judgement in the point, *Trin.* 4 H. 3. in *Cuſin*'s caſe. But *Fleta* ſaith, *Excuſatur ſi fuerit uxor alicujus, ſi fuerit per virum impedita, quòd non potuit apponere clameum.* Alſo they in reverſion or remainder expectant upon any eſtate of freehold were barred by the common law; and yet they could make no claime, becauſe, as hath beene ſaid, it belonged to the particular tenant, and not to them, becauſe their entry was not lawfull; which was one of the principall cauſes of making of the ſaid ſtatute of 34 *E.* 3. which ouſted non-claime. But theſe caſes of coverture, and of them in reverſion and remainder, are now without queſtion holpen, and juſt proviſion made for the ſaving of their rights and titles by the ſaid ſtatute of 4 *H.* 7. as by the ſaid act appeareth.

Stat. de anno. 13 E. 1.

[*c*] Pl. Com. Stowel's caſe, 359. Bracton, lib. 5. fo. 436. Britt. fo. 216. b. Fleta, lib. 6. ca. 53.

(4 H. 7. c. 24. 32 H. 8. c. 36. 2 Inſt. 516.)

Sect. 442.

ITEM, quære *ſi home ſoit diſſeiſie, et il arraigne un aſſiſe envers le diſſeiſor, et les recognitors de le aſſiſe chaunta*

ALSO, inquire if a man be diſſeiſed, and he arraigne an aſſiſe againſt the diſſeiſor, and the recognitors

(1) [See Note 206.]

(2) [See Note 207.]

† *chaunta pur le plaintife, et les juſtices d'aſſiſe voyle eſtre adviſes de lour judgment, tanques al prochein aſſiſe, &c. et en* ‡ *le dementiers le diſſeiſor moruſt ſeiſie, &c. ſi le dit ſuit del aſſiſe ſerra* ‖ *pris en ley pur le dit diſſeiſee un continuall claime, entant que nul default fuit en luy,* § *&c.*

nitors of the aſſiſe chante (1) for the plaintife, and the juſtices of aſſiſe will bee adviſed of their judgements untill the next aſſiſe, &c. and in the meane ſeaſon the diſſeiſor dieth ſeiſed, &c. yet the ſaid ſuit of the aſſiſe ſhall bee takon in law for the diſſeiſee a continuall claime, inſomuch that no default was in him, &c.

"*ARRAIGNE un aſſiſe.*" To arraigne the aſſiſe is to cauſe the tenant to be called to make the plaint, and to ſet the cauſe in ſuch order as the tenant may bee enforced to anſwer thereunto; and is derived of the French word *arraigner*, which ſignifieth to order or ſet in right place. An arraignment is ſometime called an aſtitution, of the verbe *aſtituo*, compounded of *ad* and *ſtatuo*, that is, to place or ſet in order one by another. In the ſame ſenſe that *Littleton* here uſeth it, it is uſed when an appeale is arraigned, both which are arraigned in French, but entred in Latin. And it is to bee obſerved, that *Littleton* ſaith here *arraigne un aſſiſe*, and ſaith not that the tenant is arraigned; and ſo of the appeale; for theſe are the ſuits of the ſubject, and no man is ſaid to be arraigned, but merely at the ſuit of the king, upon an enditement found againſt him, or other record wherewith he is charged. And there the arraignment of the priſoner is to take order that he appeare, and for the certainty of the perſon to hold up his hand, and to plead a ſufficient plea to the enditement or other record, whereupon they which ſollow for the king may orderly proceed.

[263. a.]

(10 Rep. 130.)

2 & 3 E. 6. c. 24, towards the end. Star.f. pl. cor. 105 C. 3 H. 7. ca. 1.

"*Juſtices d'aſſiſe.*" Juſtices of aſſiſe are aſſigned and conſtituted by the king of the judges and ſages of the law, and are called juſtices of aſſiſe, for that the writs of aſſiſe of *novel diſſeiſin*, (which in former times were accounted *feſtina remedia*, and very frequent and common) were returnable before them to be taken in their proper counties twice every yeare at the leaſt, whereupon they had authority to give judgment and award ſeiſin and execution: and therefore both for the number of them in times paſt, and for the greater authority they had then as juſtices of *niſi prius* (which was to trie iſſues only, except in *quare impedit*, and aſſiſes *de darreine preſentment*, in which caſes the juſtices of *niſi prius* might give judgment) they were denominated juſtices of aſſiſes: and divers acts of parliament have given to them great authority both in criminall cauſes and common pleas. Theſe juſtices of aſſiſe have alſo commiſſions of *oier* and *terminer*, of gaole delivery and of the peace, of aſſociation, and *ſi non omnes* throughout their whole circuits, ſo as they are armed with ample, provident, but yet ordinary juriſdiction; for all their commiſſions are bounded with this expreſſe limitation, *facturi quod ad juſtitiam pertinet ſecundum legem et conſuetudinem Angliæ*. And in former time, according to the originall inſtitution and

Vid. Sect. 514. 233, 284. Magna Charta, 30 W. 2. ca. 3. 30. 39. Stat. de Ebor. ca. 3, 4. Artic. Sup. Cart. ca. 10. 4 E. 3. ca. 11. 7 R. 2. ca. 4. 27 E. 1. de finibus ca. 4. 28 E. 1. de appellatis. 4 E. 3. ca. 2. 2 H. 5. ca. 8. 3 H. 5. ca. 7. 13 H. 4. ca. 7. North. 2 E. 3. ca. 3. 2 E. 3. ca. 5. 14 H. 6. ca. 1. 21 H. 6. ca. 10. 3 H. 7. ca. 1.

† *chaunta—chaunterent*, in L. and M. and *chaunterent* in Roh.

‡ *le* not in L. and M.

‖ *pris* not in L. and M. nor Roh.

§ *&c.* not in L. and M. nor Roh.

(1) *i. e.* Find, or give their verdict.

and their commiſſion, both the juſtices joined both in common pleas and pleas of the crowne. 33 H. 8. c. 9. 34 & 35 H. 8. ca. 14.

2 & 3 E. 6. ca. 24. 1 E. 6. ca. 7. 2 Mar. Dier 99. 3 & 4 Eliz. Dier 205. (F. N. B. 240. c. 4. Inf. 161.)

" Si le dit ſuit del aſſiſe ſerra priſe en ley, &c. un continual claime." And it is holden at this day that it ſhall amount to a claime, for that there was no default in him, as *Littleton* ſaith. [*d*] Some have objected, that if the bringing of an aſſiſe ſhould amount to continuall claime, and every continuall claime made by the diſſeiſee veſt the poſſeſſion and freehold in him, therefore if bringing the aſſiſe, &c. ſhould amount to a continuall claime, that then the writ ſhould abate. But hereunto it hath beene anſwered in this chapter, that a continuall claime is an entry by conſtruction of law for the advantage of the diſſeiſee, but not for his diſadvantage.

[*d*] See before in this chapter, Sect. 419. Vide Sect. 416. (2 Ed. 3. 8. 14 Ed. 3. 14.) (Ant. 253. b.)

In a writ of entry *ſur diſſeiſin* againſt one, ſuppoſing that he had not entred but by *S.* who diſſeiſed him, the tenant ſaid that *S.* died ſeiſed, and the land deſcended to him, and prayed his age; the plaintife counterpleaded his age, for that he arraigned an aſſiſe againſt *S.* who died hanging the aſſiſe, and he was ouſted of his age, for that the bringing of the aſſiſe amounted to a claime. 24 E. 3. 25. 9 E. 2. age. 141. 15 E. 3. Counterplea de gar. 5.

If tenant in dower alien in fee with warranty, and the heire in the reverſion being a writ of entry *in caſu proviſo, &c.* and hanging the plea the tenant dieth, the heire ſhall not be rebutted or barred by this warranty, for that the *præcipe* did amount to a continuall claime. And herewith agreeth (*) antiquity: *Et ſi clameum non appoſuerit, ſufficit tamen ſi ille vel anteceſſor ſuus faciat quod tantundem valeat, ut ſi placitum moverit tenentem vel fecerit rem litigioſam; quia ſicut plus eſt facto appellare quàm verbo, ita plus eſt clameum apponere facto quàm verbo: et ad hoc facit de termino Sanctæ Trinitatis, anno regni regis H. 3. 15. in com. Hunt. de quâdam Guldeburgâ, cui objectum fuit, quòd clameum non appoſuit, et ipſa reſpondit, quòd fecit quod tantundem valet, quia tempore finis facti implacitavit tenentem per aliud breve, &c.* 3 E. 3. tit. garrantie 62. (*) Fleta, lib. 6. ca. 52. Bract. lib. 5. fo. 436.

If the goods of a villeine (before any ſeiſure made by the lord) be diſtreined, the lord may have a replevyn; and notwithſtanding before the bringing of the writ he had no property, yet the very bringing of the writ doth amount to a claime of the goods, and veſteth the property in the lord. 33 E. 3. Replevin. 43. 42 E. 3. 18. b. 9 H. 6. 25.

" Entant que nul default fuit en luy, &c." Hereby it is implyed, that our author inclined to this opinion, that it ſhould amount to a claime, for that no default was in him; *et nemo debet rem ſuam ſine facto aut defectu ſuo amittere*, as the rule is.

[263. b.]

Sect. 443.

ITEM, quære *ſi un abbe de un monaſterie moruſt, et durant le temps de vacation un home torciouſement enter en certaine parcel de terre del monaſtery, claymant la terre a luy et*

ALSO, inquire if an abbot of a monaſterie die, and during the time of vacation a man wrongfully entreth in certaine parcels of land of the monaſterie, claiming the land unto

*et a ſes heires, et de tiel eſtate moruſt ſeiſie, et la terre diſcendiſt a ſon heire, et puis apres un * eſt elect, et fait abbe de meſme la monaſterie, ſi † meſme l'abbe poit enter ſur le heire ou nemy. Et il ſemble a aſcuns, que l'abbe bien poit enter en ceo cas, pur ceo que le covent en temps de vacance ne fuit aſcun perſon able de faire continual claime; car nient pluis que ils ſont perſonable de ‡ ſuer action, nient pluis ils ſont able de faire continual claime, car le covent § n'eſt forſque || un mort corps ſans teſte; car en temps de vacation un graunt fait a eux, ou per eux, eſt void; et en ceſt caſe l'abbe ne poit aver briefe* d'entre ſur diſſeiſin *envers le heire, pur ceo que il ne fuit unques diſſeiſee. Et ſi l'abbe ne puiſſoit enter en ceo caſe, donques il ſerra mis a ſon briefe de droit, ¶ &c. lequel ſerra trope dure pur le meaſon: per que ſemble a eux, que l'abbe bien poit enter, &c.*

unto him and his heires, and of that eſtate dieth ſeiſed, and the land deſcendeth unto his heires, and after that an abbot is choſen, and made abbot of the monaſterie, a queſtion is, if the abbot may enter upon the heire or not. And it ſeemeth to ſome, that the abbot may well enter in this caſe, for this, that the covent in time of vacation was no perſon able to make continuall claime; for no more than they be perſonable to ſue an action, no more be they able to make continuall claime, for the covent is but a dead bodie without head; for in time of vacation a grant made unto them is void; and in this caſe an abbot may not have a writ of *entrie upon diſſeiſin* againſt the heire, for this, that hee was never diſſeiſed. And if the abbot may not enter in this caſe, then hee ſhall bee put into his writ of right, &c. which ſhall bee hard for the houſe: by which it ſeemeth to them, that the abbot may well enter, &c.

Quæras de dubiis, legem bene diſcere ſi vis:

Quærere dat ſapere, quæ ſunt legitima verè ¶.

Quæras de dubijs, legem bene diſcere ſi vis:

Quærere dat ſapere, quæ ſunt legitima verè.

(Poſt. 331. a. 342. b. 345. a.) (Dyer 71. a.) (2 Roll. Abr. 399.)

HERE, firſt, it is to be obſerved, that albeit the freehold and inheritance is in this caſe in no perſon, but in abeyance or in conſideration of law, yet an entrie and claime by one that hath no right ſhall gaine the inheritance by wrong. For here *Littleton* ſaith, and of ſuch eſtate died ſeiſed, &c. And ſo it is in caſe of a biſhop, parſon, vicar, prebend, or any other ſole corporation. And in the ſtatute of *Merlebridge* it is called an intruſion.

Merleb. cap. 28.

(5 Rep. 21.)

Secondly, that ſeeing by the death of the abbot (which is the act of God) no perſon is able to make continuall claime, therefore a diſcent during that time ſhall not prejudice the ſucceſſor; for, as hath beene ſaid, *Impotentia excuſat legem.* If an uſurpation bee had to a church in time of vacation, this ſhall not prejudice the ſucceſſor, to put him out of poſſeſſion, but that at the next avoidance hee ſhall preſent.

(F. N. B. 34. m. W. 2. cap. 5.)

"*Nient*

* *abbe* added L. and M. and Roh.
† *meſme* not in L. and M. nor Roh.
‡ *ſuer—faire*, L. and M. and Roh.
§ *n'eſt—eſt*, L. and M. and Roh.
|| *come* added L. and M. and Roh.
¶ *&c.* not in L. and M.
¶ *verè* not in L. and M. nor is any part of theſe two verſes in the Camb. MSS.

" *Nient pluis que ils ſont able de ſuer action, &c.*" Here that which hath in this chapter beene ſaid is confirmed, *viz.* That the entrie or continuall claime muſt purſue the action. (8 Rep. 88. Ant. 252. b.)

" *Car le covent n'eſt forſque un mort perſon, &c.*" This is *ratio una*, but not *unica*: for though the reſt of the corporation be no mort perſons, as the chapter in caſe of deane and chapter, or the commonaltie in caſe of mayor and commonaltie; yet cannot they when there is no deane or maior make claime, becauſe they have neither abilitie nor capacitie to take or to ſue any action, as our author here ſaith.

[264. a.] " *Car en temps de vacation un graunt fait a eux ou per eux, eſt void, &c.*" And the reaſon is, becauſe the body politique which is capable, is not complete, but wanteth the head. But this is to be underſtood of an immediate grant; for if during the vacation of the abathie of Dale, a leaſe for life, or a gift in taile be made, the remainder to the abbot of Dale and his ſucceſſors, this remainder is good, if there be an abbot made during the particular eſtate. 2 H. 7. 13. 40 Aſſ. 26. 34 E. 3. Garrantie 69. (Poſt. 378.) (Ant. 239. a.)

If there be maior and commonaltie of *D.* and the maior dieth, a graunt made to the maior and commonaltie of *D.* is void for the cauſe aforeſaid; but in that caſe, if a leaſe for life be made, the remainder to the maior and commonaltie of *D.* the remainder is good, if there bee a maior elected during the particular eſtate. (10 Rep. 1. Ant. 85. 250. a. 8. a. lib. 10. Lampett's caſe. lib. 6. Biſhop of Wells's caſe. lib. 1. Rector of Chedington's caſe.)

" *Poit enter, &c.*" Here by this (*&c.*) is implyed, or make his continuall claime in ſuch ſort as hath beene before expreſſed.

Quæras de dubiis, legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima verè.

Here *Littleton* expreſſeth an excellent meanes to attaine to the reaſon of the law, by enquiring of, and conference had with, learned men, of doubtfull caſes:

Inter cuncta leges, & per cunctabere doctos. Horace.

For as *collatio peperit artes*, ſo *collatio perficit artes*: and this muſt bee continuall; for as knowledge increaſeth, ſo doubts therewith increaſe alſo; *Creſcente ſcientiâ, creſcunt ſimul et dubitationes.*

And here *Littleton* citeth verie aptly two verſes; for it is truly ſaid, that *Authoritates philoſophorum medicorum et poetarum ſunt in cauſis allegandæ et tenendæ*; and our author doth cite a verſe for memorie, but it is worthy of memorie.

Chap. 8. Of Releaſes (1). Sect. 444.

RELEASES ſont en divers manners, ceſtaſcavoir, releaſes de tout le droit que home ad en terres ou tenements, ‡ et releaſes de actions perſonals et reals, et auters choſes. Releaſes de tout le droit que homes ont en terres ou tenements, &c. ſont communement fait en tiel form ou de tiel effect:

RELEASES are in divers manners, *viz.* releaſes of all the right which a man hath in lands or tenements, and releaſes of actions perſonalls and realls, and other things. Releaſes of all the right which men have in lands and tenements, &c. are commonly made in this forme, or of this effect:

Vide Mir. cap. 2. ſect. 17. HERE our author beginneth with a diviſion of releaſes.

Vide Brit. 101. Bract. li. 5. Tract. de Except. & lib. 4. fol. 318. b. Fleta, lib. 3. cap. 14.

Theſe words muſt be referred thus: releaſes are of two ſorts, *viz.* a releaſe of all the right which a man hath either in lands and tenements, or in goods and chattels: or there is a releaſe of actions reall, of or in lands or tenements: or perſonall, of or in goods or chattels: or mixt, partly in the realty, and partly in the perſonaltie. [264. b.]

Vide Sect. 492.

[a] Fleta, ubi ſupra. "*Releaſe,*" *Relaxatio.* Of the etymologie of this word you have heard before. *Fleta* [a] calleth it *charta de quietâ clamantiâ.*

Sect. 445.

NOVERINT univerſi per præſentes, me A. de B. remiſiſſe, relaxaſſe, et omninò de me et hæredibus meis quietum clamâſſe: *vel ſic,* pro me et hæredibus meis quietum clamâſſe C. de D. totum jus, titulum, et clameum quæ habui, habeo, vel quoviſmodo in futur. habere potero, de et in uno meſſuagio cum pertinentiis in F. &c. *Et eſt aſcavoire, que ceux verbs* remiſiſſe, et quietum clamâſſe, *ſont de un tiel effect ſicome tiels verbs,* relaxâſſe.

KNOW all men by theſe preſents, that I A. of B. have remiſed, releaſed, and altogether from me and my heires quiet claimed: or thus, *for mee and my heires quiet claimed to C. of D. all the right, title, and claim which I have, or by any meanes may have, of and in one meſſuage with the appurtenances in F. &c.* And it is to bee underſtood, that theſe words, *remiſiſſe, et quietum clamâſſe,* are of the ſame effect as theſe words, *relaxâſſe.*

"NOVERINT univerſi per præſentes, &c." Here *Littleton* ſheweth preſidents of releaſes of right: and preſidents doe both teach and illuſtrate, and therefore our ſtudient is to be well ſtored with preſidents of all kindes.

Bract. lib. 4. fol. 303. Fleta, ubi ſup. 9 H. 6. 35. 24 E. 3. 27. 13 H. 4. entr. congeab. 57. "Remiſiſſe, relaxâſſe, et quietum clamâſſe." Here *Littleton* ſheweth, that there be three proper words of releaſe, and bee much of one effect: beſides, there is *renunciare, acquietare,* and there bee many

(2 Roll. Abr. 400. 403. 9 Rep. 52.)

(1) [See Note 203.] ‡ &c. added in L. and M.

many other words of releaſe; as if the leſſor grants to the leſſee for life, that he ſhall be diſcharged of the rent, this is a good releaſe. *Vide* Sect. 532.

And it is to bee underſtood, that there bee releaſes in deed, or expreſſe releaſes, whereof *Littleton* heere hath ſhewed an example. Theſe expreſſe releaſes muſt of neceſſitie be by deed. There be alſo releaſes in law, and they are ſometime by deed, and ſometime without deed. As if the lord diſſeiſe the tenant, and maketh a feoffment in fee by deed or without deed, this is a releaſe of the ſeigniorie. And ſo it is if the diſſeiſee diſſeiſe the heire of the diſſeiſor, and make a feoffment in fee by deed or without deed, this is a releaſe in law of the right. And the ſame law it is of a right in action.

27 H. 8. 29. of an uſe. 34 H. 6. 44. of an attaint. 3 E. 3. 38. 21 E. 4. 81. Pl. Com. Delamere's caſe. (8 Rep. 136. Plo. 185, 186. 5 Rep. 29.)

Hob. 10. 1 Sid. 79. 1 Roll. Abr. 934. Plo. 36.

If the obligor make the obligee his executor, this is a releaſe in law of the action, but the dutie remaines, for the which the executor may retaine ſo much goods of the teſtator (1). 8 E. 4. 3. 21 E. 4. 2.

If the feme obligee take the obligor to huſband, this is a releaſe in law. The like law is, if there be two femes obligees, and the one take the debtor to huſband (2). 11 H. 7. 4. 20 H. 7. 29. 8 E. 4. 3.

If an infant of the age of ſeventeene yeares releaſe a debt, this is void; but if an infant make the debtor his executor, this is a good releaſe in law of the action (3).

But if a feme executrix take the debtor to huſband, this is no releaſe in law, for that ſhould be a wrong to the dead, and in law worke a *devaſtavit*, which an act in law ſhall never worke. And ſo it was adjudged in the king's bench, *Mich.* 30 & 31 *Eliz.* in which caſe I was of counſell.

But it is to be obſerved, that there is a diverſitie betweene a releaſe in deed, and a releaſe in law; for if the heire of the diſſeiſor make a leaſe for life, and the diſſeiſee releaſe his right to the leſſee for his life, his right is gone for ever. But if the diſſeiſee doth diſſeiſe the heire of the diſſeiſor and make a leaſe for life, by this releaſe in law the right is releaſed but during the life of the leſſee; for a releaſe in law ſhall be expounded more favourable, according to the intent and meaning of the parties, than a releaſe in deed, [265. a.] which is the act of the partie, and ſhall be taken moſt ſtrongly againſt himſelfe, and ſo in the caſe aforeſaid, where the debtor is made executor. 30 E. 3. 24. 32 E. 3. tit. ſcire fac. 102. (Mo. 236. 1 Leo. 320. 8 Rep. 152. Plo. 184. a. Finch. 294.)

"*Totum jus, titulum, et clameum.*" But note, that *jus*, or right, in generall ſignification includeth not onely a right for the which a writ of right doth lie, but alſo any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry. (10 Rep. 47.)

(1) [See Note 209.]
(2) [See Note 210.]
(3) [See Note 211.]

Sect. 446.

ITEM, ceux parolx que ſont communement mis en tielx faits de releaſes, * ſcilicet (quæ quoviſmodo in futurum habere potero) *ſont ſicome voides en le ley; car nul droit paſſa per un releaſe, forſque le droit que le releſſor ad al temps de le releas fait. Car ſi ſoit pier et fits, et le pier ſoit diſſeiſee, et le fits (vivant ſon pier) releſſa per ſon fait a le diſſeiſor tout le droit que il ad ou aver puiſſoit en meſmes les tenements ſans clauſe de garrantie, &c. et puis le pier moruſt, &c. le fits poit loyalment enter ſur la poſſeſſion le diſſeiſor, pur ceo que il n'avoit † droit en la terre ‡ en la vie ſon pier, mes le droit diſcendiſt a luy per diſcent apres le releas fait per le mort ſon pere, &c.*

ALSO, theſe words which are commonly put in ſuch releaſes, *ſcilicet (quæ quoviſmodo in futurum habere potero)* are as voide in law; for no right paſſeth by a releaſe, but the right which the releaſor hath at the time of the releaſe made. (1) For if there be father and ſonne, and the father bee diſſeiſed, and the ſonne (living his father) releaſeth by his deed to the diſſeiſor all the right which he hath or may have in the ſame tenements without clauſe of warrantie, &c. and after the father dieth, &c. the ſonne may lawfully enter upon the poſſeſſion of the diſſeiſor, for that hee had no right in the land in his father's life, but the right deſcended to him after the releaſe made by the death of his father, &c.

NOTE, a man may have a preſent right, though it cannot take effect in poſſeſſion, but *in futuro* (2).

(2 Roll. Abr. 400. 8 Rep. Edw. Altham's caſe.)

As hee that hath a right to a reverſion or remainder, and ſuch a right he that hath it may preſently releaſe. But here in the caſe which *Littleton* puts, where the ſonne releaſe in the life of his father, this releaſe is void, [a] becauſe he hath no right at all at the time of the releaſe made, but all the right was at that time in the father; but after the deceaſe of the father, the ſonne ſhall enter into the land againſt his owne releaſe.

[a] Britton, fol. 101. 17 E. 3. 67. 42 E. 3. 21, 10 H. 6. 4. 25 Aſſ. 7. 27 E. 3. Execution 130. 1 Rep. 112. b.

16 E. 3. Barre 245. Hoe's caſe, 5. part. f. 70, 71.

The baron make a leaſe for life and dieth, the releaſe made by the wife of her dower to him in reverſion is good, albeit ſhee hath no cauſe of action againſt him *in præſenti*.

(Sect. 706.)

"*Sans clauſe de garrantie.*" For if there bee a warrantie annexed to the releaſe, then the ſonne ſhall be barred. For albeit the releaſe cannot barre the right for the cauſe aforeſaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reaſon (which in all caſes is to be fought out) wherefore a warrantie being a covenant reall ſhould barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie ſhould recover the land againſt the ter-tenant, and he by force

20 H. 6. 29.

* *ſcil.—&c.* in L. and M. and Roh.
† *nul* added in L. and M. and Roh.
‡ *quant il releſſaſſes*, added in L. and M. and Roh.

(1) [See Note 212.] (2) [See Note 213.]

force of the warrantie to have as much in value againſt the ſame perſon: yet is there a diverſity betweene a warrantie and a feoffment; [b] for if there be grandfather, father, and ſonne, and the father diſſeiſeth the grandfather, and make a feoffment in fee, the grandfather dieth, the father againſt his owne feoffment ſhall not enter; but if he die, his ſonne ſhall enter. And ſo note a diverſity betweene a releaſe, a feoffment, and a warrantie: a releaſe in that caſe is void: a feoffment is good againſt the feoffor, but not againſt his heire; a warrantie is good both againſt himſelfe and his heires (1).

[265. b.]

[b] 39 H. 6. 43. 21 E. 4. 81. 15 E. 4. tit. Entr. Cong. 21. 9 H. 7. 1. b. 2 E. 3. 38. (Poſt. 339. a.) 10 E. 2. confirmation 24. 8 E. 2. garr. 62. 11 H. 4. 33. 43 E. 3. 17. 42 E. 3. 24. per Finchden. 17 E. 3. 67.

And here are three diverſities worthy of obſervation, *viz.* Firſt, betweene a power or an authoritie, and a right. Secondly, betweene powers and authorities themſelves. Thirdly, betweene a right and a poſſibilitie.

Lib. 1. fol. 112, 113, in Albanie's caſe. (9 Rep. 75.) (1 Roll. Rep. 197.)

As to the firſt, if a man by his laſt will deviſeth that his executors ſhall ſell his land, and dieth, if the executors releaſe all their right and title in the land to the heire, this is void, for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton*'s caſe of a releaſe of a right. And ſo it is if *ceſty que uſe* had deviſed that his feoffees ſhould have ſold the land. Albeit they had made a feoffment over, yet might they ſell the uſe, for their authority in that caſe is not given away by the livery.

15 H. 7. 12.

As to the ſecond, there is a diverſity betweene ſuch powers or authorities as are only to the uſe of a ſtranger, and nothing for the benefit of him that made the releaſe (as in the caſe before) and a power or authority which reſpecteth the benefit of the releaſor; as in theſe uſuall powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uſes (being intended for his benefit) he may releaſe; and where the eſtates before were defeaſible, he may by his releaſe make them abſolute, and ſeclude himſelfe from any alteration or revocation, as it hath beene reſolved; which diverſity you may read in [m] *Albanie*'s caſe (2).

(1 Rep. 111. a. 173 Aut. 215. a. 218. b. 237. a.)

As to the third, before judgement the plaintife in an action of debt releaſeth to the baile in the king's bench all demands; and after judgement is given, this ſhall not barre the plaintife to have execution againſt the baile, becauſe at the time of the releaſe he had but a meere poſſibility, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be releaſed preſently. So if the conuſee of a ſtatute, &c. releaſe to the conuſor all his right in the land, yet afterwards he may ſue execution; for he hath no right in the land till execution, but only a poſſibilitie; and ſo have I knowne it adjudged (3).

[m] Lib. 1. Albanie's caſe, ubi ſupra. Lib. 5. Hoe's caſe, 70, 71. 10 H. 6. 4.

25 Aſſ. p. 7. 27 E. 3. Execution, 180. Paſch. 38 Eliz. Rot. 521. inter 2 Cro. 401. 449.

Borough et Gray. (2 Roll. Abr. 404. 408. Hob. 46.

(1) [See Note 214.]

(2) See Note 2 to page 113. The doctrine of the ſuſpenſion and extinction of powers will be conſidered in a note to the chapter of Diſcontinuance.

(3) [See Note 215.]

Sect. 447.

ITEM, en releaſes de tout le droit que home ad en certein terres, &c. il covient a celuy a que le releas eſt fait en * *aſcun cas, que il ad le franktenement en les terres* † *en fait, ou en ley, al temps de releas fait, &c.* ‡ *Car en cheſcun cas lou celuy a que le releas eſt fait, ad franktenement en fait, ou franktenement en ley, al temps del releas,* ‖ *&c.* § *donque le releas eſt bone.*

ALSO, in releaſes of all the right which a man hath in certaine lands, &c. it behoveth him to whom the releaſe is made in any caſe, that hee hath the freehold in the lands in deed, or in law, at the time of the releaſe made, &c. For in every caſe where he to whom the releaſe is made, hath the freehold in deed, or in law, at the time of the releaſe, &c. there the releaſe is good (4).

49 E. 3. 28.

(Doct. and Stud. 18. a. 10 Rep. 48. b. Poſt. 276. a.)

[c] 7 E. 4. 13. 20 H. 6. 29. 5 H. 7. 41. 18 E. 3. 12. 8 H. 4. 5. 5 E. 3. 36. 5 E. 3. 46. Vide Sect. 490, 491.

(Poſt. 284. b. 1 Rep. 87. b. 3 Rep. 29. b.

[d] 10 E. 4. 14. 12 Aſſ. p. 41. 8 E. 3. 21. 46 E. 3. 6. b. 8 H. 6. 23. 21 H. 7. 41. (Poſt. 284. a. 8 Rep. 148. 5 Rep. 24. b. 2 Cro. 151.)

"*DE tout le droit.*" This muſt be intended of a bare right, and not of a releaſe of right, whereby any eſtate paſſeth, as to a leſſee for yeares, &c. as ſhall be ſaid hereafter. Alſo it muſt be intended of a releaſe of a right of freehold at the leaſt, and not to a right for any terme for yeares or chattle reall; as if leſſee for yeares bee ouſted, and hee in the reverſion diſſeiſed, and the diſſeiſor maketh a leaſe for yeares, the firſt leſſee may releaſe unto him. All which is implyed in the firſt *&c.* Alſo in ſome caſe a releaſe of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, [c] as the demandant may releaſe to the vouchee, and yet the vouchee hath nothing in the land: but the reaſon of that is, for that when the vouchee entreth into the warrantie, he becommeth tenant to the demandant, and may render the land to him, in reſpect of the privitie; but an eſtranger cannot releaſe to the vouchee, becauſe, *in rei veritate*, he is not tenant of the land.

[d] And ſo it is if the tenant alien hanging the *præcipe*, the releaſe of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land. [266. a.]

In time of vacation an annuity, that the perſon ought to pay, may be releaſed to the patron in reſpect of the privity; but a releaſe to the ordinary only ſeemeth not good, becauſe the annuitie is temporall.

If a diſſeiſor make a leaſe for life, the diſſeiſee may releaſe to him; for to ſuch a releaſe of a bare right there needs no privity, as ſhall be ſaid hereafter. But if the diſſeiſor make a leaſe for yeares, the diſſeiſee cannot releaſe to him, becauſe he hath no eſtate of freehold. And yet in ſome caſe a right of freehold ſhall drowne in a chattell; as if a feme hath a right of dower ſhe may releaſe to the gardein in chivalry, and her right of freehold ſhall drowne in the chattle, becauſe the writ of dower doth lie againſt him, and the heire ſhall take advantage of it. And it is to be obſerved,

* *aſcun—tiel*, in L. and M. and Roh.
† *&c.* added in L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
‖ *fait* added in L. and M. and Roh.
§ *donque* not in L. and M. nor Roh.

(4) Ant. 1ſt Note to this Chapter.

obſerved, that by the antient maxime of the common law, a right of entrie, or a choſe in action, cannot be granted or transferred to a ſtranger, and thereby is avoyded great oppreſſion, injurie, and injuſtice. *Nul charter, nul vende, ne nul done vault perpetualment ſi le donor n'eſt ſeiſie al temps de contracts de 2. droits, s. del droit de poſſeſſion, et del droit del propertie.* And therefore well ſaith *Littleton*, that he to whom a releaſe of a right is made muſt have a freehold. (Dyer 30. b. 2 Cro. 105.) Mirror, cap. 2. § 17. (2 Roll. Abr. 45. 46. 47. 48. Ant. 214. a. 232. b. Poſt. 280.)

For the better underſtanding of transferring of naked rights to lands or tenements, either by releaſe, feoffment, or otherwiſe, it is to be knowne, that there is *jus proprietatis*, a right of ownerſhip, *jus poſſeſſionis*, a right of ſeiſin or poſſeſſion, and *jus proprietatis & poſſeſſionis*, a right both of property and poſſeſſion: and this is antiently called *jus duplicatum*, or *droit droit*. For example, if a man be diſſeiſed of an acre of land, the diſſeiſee hath *jus proprietatis*, the diſſeiſor hath *jus poſſeſſionis*; and if the diſſeiſee releaſe to the diſſeiſor, hee hath *jus proprietatis et poſſeſſionis* (1). And regularly it holdeth true, that when a naked right to land is releaſed to one that hath *jus poſſeſſionis*, and another by a meane title recover the land from him, the right of poſſeſſion ſhall draw the naked right with it, and ſhall not leave a right in him to whom the releaſe is made. For example, if the heire of the diſſeiſor being in by diſcent *A.* doth diſſeiſe him, the diſſeiſee releaſe to *A.* now hath *A.* the meere right to the land. But if the heire of the diſſeiſor enter into the land, and regaine the poſſeſſion, that ſhall draw with it the meere right to the land, and ſhall not regaine the poſſeſſion only, and leave the meere right in *A.* but by the recontinuance of the poſſeſſion, the meere right is therewith veſted in the heire of the diſſeiſor. Mirror ubi ſupra. Bracton, lib. 2. fol. 32. Britton, fol. 89. 121. Bracton, lib. 5. fol. 372. (2 Rep. 56. Sect. 473. Poſt. 283. b. 286. a.)

But if the donee in taile diſcontinue in fee, now is the reverſion of the donor turned to a naked right. If the donor releaſe to the diſcontinuee and die, and the iſſue in taile doth recover the land againſt the diſcontinuee, he ſhall leave the reverſion in the diſcontinuee; for the iſſue in taile can recover but the eſtate taile onely, and by conſequence muſt leave the reverſion in the diſcontinuee, for the donor cannot have it againſt his releaſe: but if the diſſeiſee enter upon the heire of the diſſeiſor, and infeoffee *A.* in fee, and the heire of the diſſeiſor recover the whole eſtate, that ſhall draw with it the meere right, and leave nothing in the feoffee. *Nota* the diverſity. Another diverſity is obſervable when the naked right is precedent before the acquiſition of the defeaſible eſtate, for there the recontinuance of the defeaſible eſtate ſhall not draw with it the preceding right [e]. As if the diſſeiſee diſſeiſe the heire of the diſſeiſor, albeit the heire recover the land againſt the diſſeiſee, yet ſhall he leave the preceding right in the diſſeiſee. So if a woman that hath right of dower diſſeiſe the heire, and he recover the land againſt her, yet ſhall he leave the right of dower in her. (Poſt. 319. a.) [e] 5 Aſſ. 1. 10 Aſſ. 16. 50 E. 3. 7. 4 E. 3. Eſtopp. 133. 30 Aſſ. 5. (6 Rep. 70. a.)

11 E. 3. Entrie 56. 12 Aſſ. 41. 27 E. 3. 84. 488.

Another diverſity is to be noted, when the meere right is ſubſequent, and transferred by act in law; there, albeit the poſſeſſion be recontinued, yet that ſhall not draw the naked right with it, but ſhall leave it in him: as if the heire of the diſſeiſor be diſſeiſed, and the diſſeiſor infeoffe the heire apparent of the diſſeiſee being of full age,

(1) [See Note 216.]

23 H. 8. tit. Reſtore al action Br. 5. 50 E. 3. 7. Vid. Sect. 473. 475. 478. 487.

age, and then the diſſeiſee dieth, and the naked right deſcend to him, and the heire of the diſſeiſor recover the land againſt him, yet doth he leave the naked right in the heire of the diſſeiſee. So if the diſcontinuee of tenant in taile infeoffe the iſſue in taile of full age, and tenant in taile die, and then the diſcontinuee recover the land againſt him, yet he leaveth the naked right in the iſſue [c]. But if the heire of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſe to the diſſeiſor upon condition, if the condition be broken, it ſhall reveſt the naked right. And ſo if the diſſeiſee hath entred upon the heire of the diſſeiſor, and made a feoffment in fee, upon condition, if he entred for the condition broken, and the heir of the diſſeiſor entred upon him, the naked right ſhould be left in the diſſeiſee. But if the heire of the diſſeiſor had entred before the condition broken, then the right of the diſſeiſee had beene gone for ever. But now let us heare what *Littleton* ſaith.

[c] 38 E. 3. 16. 9 H. 7. 24. (Poſt. 279. a. 4 Rep. 9. b.)

Sect. 448. [266. b.]

*FRANKTENEMENT en ley eſt, ſicome un home diſſeiſiſt un auter, ct * moruſt ſeiſie, per que les tenements diſcendont a ſon fits, coment que ſon fits ne entra pas en les tenements, uncore il ad un franktenement en ley, quel per force de diſcent eſt jecte ſur luy, et pur ceo un releas fait a luy, iſſint eſtcant ſeiſie de franktenement en ley, eſt aſſets bon; et s'il prent feme iſſint eſtcant ſeiſie en ley, coment que il ne unque enter pas en fait, et moruſt, ſon feme ſerra endow* †.

FREEHOLD in law is, as if a man diſſeiſeth another, and dieth ſeiſed, whereby the tenements deſcend to his ſonne, albeit that his ſonne doth not enter into the tenements, yet he hath a freehold in law, which by force of the diſcent is caſt upon him, and therefore a releaſe made to him, ſo being ſeiſed of a freehold in law, is good enough; and if he taketh wife being ſo ſeiſed in law, although he never enter in deed, and dieth, his wife ſhal be endowed.

(Doct. & Stud. 17. a.)

HERE *Littleton* deſcribeth what a freehold in law is, for he had ſpoke before in many places of freeholds in deed. This

[a] Bract. li. 4. 1. 206. 236. Britton, fol. 83. b. Fleta, lib. 3. cap. 15.

Bracton calleth [a] *civilem et naturalem poſſeſſionem ſeu ſeiſinam.* The naturall ſeiſin is the freehold in deed, and the civill the freehold in law (1). Vid. Sect. 680.

42 E. 3. 20. 10 H. 6. 14. 17 E. 3. 78. 2 E. 3. 33. (5 Rep. 123. b.) (Mo. 141.)

If a man levie a fine to a man *ſur conuſance de droit come ceo que il ad de ſon done*, or a fine *ſur conuſance de droit tantùm*; theſe be feoffments of record, and the conuſee hath a freehold in law in him before hee entreth.

11 H. 4. 61. 21 H. 7. 12.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; ſo upon a partition the freehold is not removed untill an entry.

[g] 32 E. 3. barre 262. 41 Aſſ. 2. 13 H. 4. ſurrender, 10.

[g] If tenant for life by the agreement of him in the reverſion ſurrender unto him; he in the reverſion hath a freehold in law in him

* *ent* added L. and M. and Roh. † &c. added L. and M. and Roh.

(1) [See Note 217.]

him before he enter [h]. Upon a livery within the view no freehold is veſted before an entrie. [h] 38 E. 3. 12.

If a man doth bargaine and ſell land by deed indented and inrolled, the freehold in law doth paſſe preſently. And ſo when uſes are raiſed by covenant upon good conſideration.

If a tenant in a *præcipe* being ſeiſed of lands in fee, confeſſe himſelfe to be a villeine to an eſtranger, and to hold the land in villenage of him, the eſtranger by this acknowledgement is actually ſeiſed of the freehold and inheritance without any entry. But let us returne to *Littleton*. 17 E. 3. 77. 18 E. 4. 28.

Sect. 449.

(Plo. 352.)

ITEM, en aſcuns caſes de releaſes de tout le droit, coment que celuy a que le releaſe eſt fait n'ad riens en le franktenement en fait ne en ley, uncore le releaſe eſt aſſets bone. Sicome le diſſeiſor leſſa la terre que il ad per diſſeiſin a un auter pur terme de ſa vie, ſavant le reverſion a luy, ſi le diſſeiſie ou ſon heire releſſa al diſ-
[267. a.] *ſeiſor tout le droit, &c. cel releaſe eſt bone, pur ceo que celuy a que le releaſe eſt fait, avoit en luy un reverſion al temps del releaſe fait.*

ALSO, in ſome caſes of releaſes of all the right, albeit (2) that he to whom the releaſe is made hath nothing in the freehold in deed nor in law, yet the releaſe is good enough. As if the diſſeiſor letteth the land which hee hath by diſſeiſin to another for terme of his life, ſaving the reverſion to him, if the diſſeiſee or his heire releaſe to the diſſeiſor all the right, &c. this releaſe is good, becauſe hee to whom the releaſe is made, had in law a reverſion at the time of the releaſe made (1).

HERE *Littleton* addeth a limitation to the next precedent Section, *viz.* that a releaſe of all the right may be good to him in reverſion, albeit he hath nothing in the freehold, becauſe he hath an eſtate in him. 7 E. 4. 13. 14 H. 4. 32. b. 41 E. 3. 17. 49 E. 3. 28. caſe ult.

'*Tout le droit, &c.*" Or title, intereſt, demand, or the like; and ſo it is if he in the reverſion hath an eſtate for life or in taile in reverſion, as in the like caſe it appeareth in the next Section.

Sect. 450.

EN meſme le maner eſt, lou leas eſt fait a un home pur terme de vie, le remainder a un auter pur terme de * *auter vie, le remainder a le tierce en le*

IN the ſame manner it is, where a leaſe is made to a man for terme of life, the remainder to another for terme of another man's life, the remainder

* *auter* not in L. and M. nor Roh. nor in Cambr. MSS.

(2) [See Note 218.] (1) [See Note 219.]

Et taile, le remainder a le quart en fee, ſi un eſtranger que droit ad a la terre releſſa tout ſon droit a aſcun de eux en le remainder, tiel releaſe eſt bone, pur ceo que cheſcun de eux ad un remainder en fait veſtue en luy.

remainder to the third in taile, the remainder to the fourth in fee, if a ſtranger which hath right to the land releaſeth all his right to any of them in the remainder, ſuch releaſe is good, becauſe everie of them hath a remainder in deed veſted in him.

7 E. 4. 13.
41 E. 3. 7.
17 E. 3. 54.
18 E. 2.
Tit. Entrie 74.
3 E. 2.
Tit. Entrie 7.
F. N. B. 207. E.

HERE is another limitation, that a releaſe is good to him in the remainder, albeit hee hath nothing in the freehold in poſſeſſion, becauſe he hath an eſtate in him, as hath beene ſaid. In both theſe limitations it is to be obſerved, that the ſtate which maketh a man tenant to the *præcipe* is ſaid to be the freehold, as here the ſtate of tenant for life, and not the reverſion in fee.

Sect. 451.

MES ſi le tenant a terme de vie ſoit diſſeiſie, et puis celuy que ad droit (eſteant le poſſeſſion en le diſſeiſor) releſſa a un de eux a que le remainder fuit fait tout †ſon droit, cel releaſe eſt void, pur ceo que il n'avoit ‡un remainder en fait al temps de releaſe fuit, forſque tantſolement un droit del remainder.

BUT if the tenant for terme of life be diſſeiſed, and afterwards he that hath right (the poſſeſſion being in the diſſeiſor) releaſeth to one of them to whom the remainder was made all his right, this releaſe is void, becauſe hee had not a remainder in deed at the time of the releaſe made, but only a right of a remainder.

"*FORSQUE tantſolement un droit del remainder.*" For a releaſe of a right to one that hath but a bare right regularly is void; for, as *Littleton* hath before ſaid, hee to whom a releaſe is made of a bare right in lands and tenements, muſt have either a freehold in deed or in law in poſſeſſion, or a ſtate in remainder or reverſion in fee or fee taile, or for life.

Vide Sect. 454.

Sect. 452. [267. b.]

ET nota, que cheſcun releaſe fait a celuy que ad un reverſion ou un remainder en fait, ſervera et aidera celuy que ad le franktenement, autybien come a celuy a que releaſe fuit fait, ſi le tenant avoit le releaſe en ſon poigne + de pleader.

AND note, that every releaſe made to him which hath a reverſion or a remainder in deed, ſhall ſerve and aid him who hath the freehold, as well as him to whom the releaſe was made, if the tenant hath the releaſe in his hand to plead.

† *ſon—le*, L. and M. and Roh.
‡ *en luy* added L. and M. and Roh.
+ *de pleader* not in L. and M. nor Roh.

Sect.

Sect. 453.

ET en meſme le manner † eſt lou un releaſe ‡ eſt fait al tenant pur terme de vie, ou al tenant en le taile, ‖ ceo urera a eux en le reverſion, ou a eux en le remainder, auxybien come al tenant de franktenement, et averont auxy grand advantage de cel, s'ils ceo poyent monſtre §.

IN the ſame manner it is where a releaſe is made to the tenant for life, or to the tenant in taile, this ſhall enure to them in the reverſion, or to them in the remainder, as well as to the tenant of the freehold, and they ſhall have as great advantage of this, if they can ſhew it.

BY this it appeareth, that as a releaſe made of a right to him in reverſion or remainder, ſhall aid and benefit him that hath the particular eſtate for yeares, life, or eſtate taile, ſo a releaſe of a right made to a particular tenant for life, or in taile, ſhall aid and benefit him or them in the remainder.

If two tenants in common of land graunt a rent charge of 40s. out of the ſame to one in fee, and the grantee releaſe to one of them, this ſhall extinguiſh but twentie ſhillings, for that the graunt in judgement of law was ſeverall (1). So it is if two men be ſeiſed of ſeverall acres, and grant a rent *ut ſupra*. But there is a diverſitie betweene ſeverall eſtates in ſeverall lands, and ſeverall eſtates in one land; for if one be tenant for life of lands, the reverſion in fee over to another, if they two joyne in a grant of a rent out of the lands, if the grantee releaſeth either to him in the reverſion, or to tenant for life, the whole rent is extinguiſhed, for it is but one rent, and iſſueth out of both eſtates, and ſo note the diverſitie (2).

(2 Roll. Abr. 414. Poſt 275. a. 279. b. 285. b. 297. a. Ant. 147. b. 197.)

(1 Rep. Mayoe's caſe.)

"*Si le tenant ad le fait en ſon poigne a plcader.*" And ſo it is in both caſes: for albeit he in the reverſion or remainder is a ſtranger to the deed, when the releaſe is made to the tenant, and the tenant for life or in taile is a ſtranger to the deed, when the releaſe is made to him in reverſion or remainder, yet ſeeing they are privies in eſtate, none of them in pleading ſhall take benefit thereof, without ſhewing the ſame in court, which is worthy to be obſerved.

35 H. 6. 8.

"*S'ils ceo poient monſtre.*" The one cannot plead the releaſe made to the other without ſhewing of it, for that they are privie in eſtate, as hath beene ſaid. The reſidue of theſe two Sections needs no explication.

(Ant. 232. a. Hob. 66. 2 Roll. Abr. 412.)

† *eſt lou* not in L. and M. nor Roh.
‡ *eſt* not in L. and M. nor Roh.
‖ *ceo* not in L. and M. nor Roh.
§ *&c.* added in L. and M. and Roh.

(1) [See Note 220.]

(2) [See Note 221.]

Sect.

Sect. 454. [268. a.]

ITEM, ſi ſoit ſeignior et tenant, et le tenant ſoit diſſeiſee, et le ſeignior releſſa al diſſeiſee tout le droit que il avoit en le ſeigniorie ou en le terre, cel releaſe eſt bone, et le ſeigniorie eſt extinct: et ceo eſt pur cauſe del privitie que eſt perenter le ſeignior et le diſſeiſee. Car ſi les avers le diſſeiſee ſoient pris, et de eux le diſſeiſee ſuiſt un replevin envers le ſeignior, il compellera le ſeignior d'avowrer ſur luy; car s'il avower ſur le diſſeiſor, donques ſur le matter monſtre l'avowrie abatera, car le diſſeiſee eſt tenant a luy en droit et en la ley.

ALSO, if there bee lord and tenant, and the tenant be diſſeiſed, and the lord releaſeth to the diſſeiſee all the right which he hath in the ſeigniorie or in the land, this releaſe is good, and the ſeigniorie is extinct: and this is by reaſon of the privitie which is betweene the lord and the diſſeiſee. For if the beaſts of the diſſeiſee be taken, and of them the diſſeiſee ſueth a replevin againſt the lord, hee ſhall compell the lord to avow upon him; for if hee avow upon the diſſeiſor, then upon the matter ſhewn the avowrie ſhall abate, for the diſſeiſee is tenant to him in right and in law (1).

HEREUPON may bee collected and obſerved two diverſities: firſt, betweene a ſeigniorie or rent ſervice, and a rent charge: for a ſeigniorie or rent ſervice may bee releaſed and extinguiſhed to him that hath but a bare right in the land. And the (3 Rep. 35. b.) reaſon hereof is, in reſpect of the privitie betweene the lord and the tenant in right; for he is not only as tenant to the avowrie, but if hee die, his heire within age, hee ſhall bee in ward; and if of full age, hee ſhall pay releefe; and if he die without heire, the land ſhall eſcheat. But there is no ſuch privitie in caſe of a rent charge, for there the charge only lieth upon the land.

Vid. Sect. 451. The ſecond diverſitie is betweene a ſeignorie and a bare right to land; for a releaſe of a bare right to land to one that hath but a bare right is void, as hath beene ſaid. But here in the caſe of our author, a releaſe of a ſeigniorie to him that hath but a right, is good to extinguiſh the ſeigniorie.

Lib. 10. fol. 48. Lampet's caſe. *Nota*, a ſeigniorie, rent, or right, either *in præſenti*, or *in futuro*, may be releaſed five manner of wayes, and the firſt three without any privitie. Firſt, to the tenant of the freehold in deed or in law. Secondly, to him in remainder. Thirdly, to him in the reverſion. (Poſt. 275. 2 Roll. Abr. 402.) The other two in reſpect of privitie: as, firſt, here the lord releaſeth his ſeigniorie to the tenant being diſſeiſed, having but a right, and no eſtate at all: ſecondly, in reſpect of the privitie, without any eſtate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath diſcontinued in fee, as appeareth Sect. 455. hereafter in this chapter.

"*Per cauſe de privitie, &c.*" See for this word (*privitie*), Sect. 461,

"*Il*

(1) Here the releaſe operates by way of extinguiſhment. See poſt. 279. b.

"*Il compellera le ſeignior d'avowrer ſur luy, &c.*" This is regularly true; but if the lord hath accepted ſervices of the diſſeiſor, then the diſſeiſee cannot enforce the lord to avow upon him, though his beaſts be taken, &c. (2). 20 H. 6. 9. b. 41 E. 3. 26. 48 E. 3. 9. 2 E. 4. 6. a.

If a man hath title to have a writ of eſcheat, if he accept homage or fealtie of the tenant, he is barred of his writ of eſcheat; but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a baylife. [*d*] But ſome doe hold, that if there be lord and tenant, and the tenant be diſſeiſed, and the diſſeiſee die without heire, the lord accepts rent by the hands of the diſſeiſor, this is no barre to him. Contrarie it is, if he avow for the rent in court of record, or if he take a corporall ſervice, as homage or fealtie, for the diſſeiſor is in by wrong: but if the lord accept the rent by the hands of the heire of the diſſeiſor, or of his feoffee, becauſe they be in by title, this ſhall barre him of his eſcheat, which is to be underſtood of a diſcent or feoffment, after the title of eſcheat accrued: [*e*] for if the diſſeiſor make a feoffment in fee, or die ſeiſed, and after the diſſeiſee die without heire, then there is no eſcheat at all, becauſe the lord hath a tenant in by title. And when *Littleton* wrote, the diſſeiſee in the caſe here put, ſhould have compelled the lord to have avowed upon him, as *Littleton* holdeth. But now this is altered by a latter ſtatute of [*f*] 21 H. 8. For whereas by fines, recoveries, grants, and ſecret feoffments, &c. made by tenants to perſons unknowne, the lords were put from knowledge of their tenants, upon whom by order of law they ſhould make their avowrie, &c. it is by that ſtatute enacted, that if the lord ſhall diſtreine upon the lands and tenements holden, &c. that he may avow, &c. upon the ſame lands, &c. as in lands, &c. within his fee or ſeigniorie, &c. without naming of any perſon certaine, and without making avowrie upon a perſon certaine. Upon which ſtatute theſe foure points are to be obſerved. Firſt, that the lord hath ſtill election either to avow according to the common law, by force of the ſtatute, by reaſon of this word (*may*). Secondly, albeit the purview of the act be generall, yet all neceſſary incidents are to be ſupplyed, and the ſcope and end of the act to be taken: and therefore, though he need not to make his avowrie upon any perſon certaine, yet he muſt alleage ſeiſin by the hands of ſome tenant in certaine, within fortie yeares. Thirdly, that if the avowrie be made according to the ſtatute, everie plaintife in the replevin, or ſecond deliverance, be he termor or other, may have everie anſwer to the avowrie that is ſufficient; and alſo have aid, and everie other advantage in law (diſclaimer only except); for diſclaime he cannot, becauſe in that caſe the avowrie is made upon no certaine perſon. Fourthly, where the words of the ſtatute be, if the lord diſtreine upon the lands and tenements holden, yet if the lord come to diſtreine, and the tenant enchaſe his beaſts which were within the view out of the land holden, and there the lord diſtreine, albeit the diſtreſſe be taken out of his fee and ſeigniorie in that caſe, yet is it within the ſaid ſtatute: for in judgment of law the diſtreſſe is lawfull, and as taken within his fee and ſeigniorie; and this ſtatute being made to ſuppreſſe fraud, is to be taken by equitie (1). 6 R. 2. Reſcous. 11.

[268. b]

[*d*] 7 E. 6. tit. Eſcheat. Br. 18. (9 Rep. 22. 1 Roll. Abr. 816. b.)

[*e*] 7 H. 4. 17. 3 R. 2. entr. cong. 38. 2 H. 4. 8. 6 H. 7. 9. Vide Sect. 556.

[*f*] 21 H. 8. cap. 19. (Hob. 242.)

Lib. 9. fol. 136. Aſcough's caſe.

27 H. 8. fol. 4, 32 H. 8, cap. 2. Lib. 9. fol. 36. Bucknal's caſe.

34 H. 8. Avowrie Br. 113. 27 H. 8. 4. & 20. Bucknal's caſe ubi ſupra.

Lib. 9. fol. 22. in caſe d'avowrie. 44 E. 3. 20. 11 H. 7. 4. 21 H. 7. 40. 34 H. 6. 18. 16 E. 4. 10. (Ant. 161.)

(2) [See Note 222.] (1) See the following page. Gilb. Diſtr. 189. Lord Raym. 257.

Sect. 455.

ITEM, ſi terre ſoit done a un home en taile, reſervant al donor et a ſes heires un certaine rent, ſi le donee ſoit diſſeiſie, et puis le donor releſſa al donee et a ſes heires tout le droit que il avoit en la terre, et puis le donee enter en la terre ſur le diſſeiſor; en ceſt caſe le rent eſt ale, pur ceo que le diſſeiſee al temps de releaſe fait, fuit tenant en droit et en la ley al donor, et avowrie a fine force covient de eſtre fait ſur luy per le donor pur le rent aderere, &c. Mes uncore rien de droit de terres, ſcilicet, *de le droit de le reverſion, * paſſera per tiel releaſe, pur ceo que le donee a que le releaſe eſt fait, adonque n'avoit riens en la terre forſque tantſolement un droit, et iſſint le droit del terre ne puiſſoit † adonques paſſer al donee per tiel releaſe.*

ALSO, if land be given to a man in taile, reſerving to the donor and to his heires a certaine rent, if the donee be diſſeiſed, and after the donor releaſe to the donee and his heires all the right which hee hath in the land, and after the donee enter into the land upon the diſſeiſor; in this caſe the rent is gone, for that the diſſeiſee at the time of the releaſe made, was tenant in right and in law to the donor, and the avowrie of fine (a) force ought to bee made upon him by the donor for the rent behinde, &c. But yet nothing of the right of the lands, *(ſcilicet)* of the reverſion, ſhall paſſe by ſuch releaſe, for that the donee to whom the releaſe is made, then had nothing in the land but onely a right, and ſo the right of the land could not then paſſe to the donee by ſuch releaſe.

Vide Sect. 454. 1 H. 5. tit. grant. 43. 14 H. 4. 38. li. 3. fol. 29. lib. 6. 58. Lampet's caſe ubi ſupra. (Ant. 46. Poſt. 348.)

"*SI le donee ſoit diſſeiſie, &c.*" This is evident by that which hath beene ſaid. But admit that the donee [269. a.] maketh a feoffment in fee, and the donor releaſe unto him and his heires all the right in the land, this ſhall extinguiſh the rent, becauſe the lord muſt avow upon him, and yet the tenant in taile after the feoffment hath no right in the land. But the reaſon is in reſpect of the privity, and that the [m] donor is by neceſſity compellable to avow upon him only; for if he ſhould avow upon the diſcontinuee, then it ſhould appeare of his owne ſhewing that the reverſion whereunto the rent is incident, ſhould be out of him, and conſequently the avowrie ſhould abate; and ſo was it [n] reſolved *Trin.* 18 *Eliz.* in the court of common pleas in ſir *Thomas Wiat's* caſe, which I heard and obſerved. And *Littleton* ſaith here, that in caſe of the diſſeiſin of fine force, the avowrie muſt be made upon the donee.

[m] 10 E. 3. 26. 48 E. 3. 8. b. 31 E. 3. gard. 116. 5 E. 4. 3. 7 E. 4. 27. 15 E. 4. 13.

[n] Trin. 18 Eliz. ſir Thomas Wiat's caſe in communi banco.

"*Uncore riens de droit, &c. de reverſion, &c.*" Here the diverſitie aforeſaid betweene the rent ſervice and a bare right to the land appeareth.

* *adonques ne* added L. and M. and Roh. † *adonques* not in L. and M.

(a) That is, of neceſſity.

Sect. 456.

EN meſme le manner eſt, ſi leas ſoit * *a un pur terme de vie, reſervant al leſſor et a ſes heires certaine rent, ſi le leſſee ſoit diſſeiſie, et puis leſſor releſſa al leſſee et a ſes heires tout le droit que il ad en la terre, et apres le leſſee enter, coment que en ceſt cas le rent eſt extinct, uncore rien del droit de la reverſion paſſera*, cauſâ quâ ſupra.

IN the ſame manner it is, if a leaſe be made to one for terme of life, reſerving to the leſſor and to his heires a certaine rent, if the leſſee be diſſeiſed, and after the leſſor releaſe to the leſſee and to his heires all the right which he hath in the land, and after the leſſee entreth, albeit in this caſe the rent is extinct, yet nothing of the right of the reverſion ſhall paſſe, *cauſâ quâ ſupra.*

HEREBY the diverſity is made apparent betweene a releaſe of a rent ſervice out of land, and a releaſe of right to land, in this Section.

Sect. 457.

MES ſi ſoit veray ſeignior et veray tenant, et le tenant fait un feoffment en fee, lequel feoffee ne unque devient tenant al ſeignior, † *ſi le ſeignior releſſa al feoffor tout ſon droit, &c. ceſt releas eſt en tout void, pur ceo que le feoffor ad nul droit en la terre, et il n'eſt tenant en droit al ſeignior, mes tenant ſolement tenant quant al avowry faire, et il ne unques compellera le ſeignior d'avower ſur luy, car le ſeignior avowera ſur le feoffee ſ'il voile.*

BUT if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, if the lord releaſe to the feoffor all his right, &c. this releaſe is altogether void, becauſe the feoffor hath no right in the land, and he is not tenant in right to the lord, but only tenant as to make the avowrie, and hee ſhall never compell the lord to avow upon him, for the lord ſhall avow upon the feoffee if hee will.

"*VERAY ſeignior et veray tenant.*" This is to be underſtood of a lord in fee ſimple, and of a tenant of like eſtate.

There be foure manner of avowries for rents and ſervices, &c. viz. 1. *Super verum tenentem*, as in the caſe here put. 2. *Super verum tenentem in formâ prædictâ*, as where a leaſe for life, or a gift in taile bee made, the remainder in fee. 3. Upon one as upon his tenant by the manor omitting (*verie*); and this is when the lord [269. b.] hath a particular eſtate in the ſeigniorie, and ſo ſhall the donor upon the donee, or leſſor upon the leſſee. 4. *Sur le matter en la terre*, as within his fee and ſeigniorie. As where the tenant by knights ſervice maketh a leaſe for life reſerving a rent, and die his heire within age, the gardeine ſhall avowe upon the leſſee, *ſcilicet, ſuper materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium ſuum.* Now by the ſtatute the very lord may

Vide Aſcough's caſe, l. 9. f. 135, 136. 20 H. 6. 9. 2 H. 4. 24. 12 E. 4. 2. 26 H. 6. avowrie 17. 9 Eliz. Dier 257. 5 H. 7. 11. 7 E. 4. 24. 20 E. 3. avow. 131. (9 Rep. 135. b. 21 H. 3. c. 19.) 47 E. 3. fol. ultimo.

38 H. 6. 25. (Doc. Pla. 53.) 21 H. 8. chp. 19. (Poſt. 345.)

* *fait* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

nuty avow, as in lands within his fee and ſeigniorie, without avowing upon any perſon in certaine (1).

Here appeareth the diverſity betweene a tenant in taile, and a tenant in fee ſimple; for albeit tenant in taile make a feoffment in fee, yet the right of the entaile remaine, and ſhall deſcend to the iſſue in taile. But when the tenant in fee ſimple make a feoffment in fee, no right at all remaine of his eſtate, but the whole is transferred to the feoffee.

Alſo the lord is not compellable in that caſe to avow upon the feoffor; but if he will, as *Littleton* here ſaith, he may avow on the feoffee; but ſo it is not, as hath beene ſaid, in caſe of tenant in taile.

Note a diverſity betweene actions and acts which concerne the right, and actions and acts which concerne the poſſeſſion only. For a writ of cuſtomes and ſervices lieth not againſt the feoffor, nor a releaſe to him ſhall extinguiſh the ſeigniorie. So if a rescous be made, an aſſiſe ſhall not lie againſt the feoffor, and him that made the reſcous, becauſe the feoffee is tenant, and in aſſiſe; the ſurpluſſage intruached ſhall be avoided. For theſe actions and acts concerne the right; but of a ſeiſin and an avowrie which concerne the poſſeſſion, it is otherwiſe. And if the lord releaſe to the feoffor, this is good betweene them, as to the poſſeſſion and diſcharge of the arrerages, but the feoffee ſhall not take benefit of it, for that, as hath beene ſaid, it extendeth not to the right. But the feoffor ſhall plead a releaſe to the feoffee, for thereby the ſeigniorie is extinct; as if leſſee for life doth waſte, and grant over his eſtate; and the leſſor releaſe to the grantee, in an action of waſte againſt the leſſee, he ſhall plead the releaſe, and yet he hath nothing in the land. And ſo in waſte ſhall tenant in dower or by the courteſie in the like caſe, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And ſo in a *contra formam collationis*.

(Doc. Pla. 321.)

"*Le feoffee ne unques devcigne tenant*." *Nota* here an excellent point of learning, *viz.* if there be lord and tenant, and the rent is behind by divers yeares, and the tenant make a feoffment in fee, if the lord accept the ſervice or rent of the feoffee due in his time, he ſhall loſe the arrerages due in the time of the feoffor; for after ſuch acceptance he ſhall not avow upon the feoffor, nor upon the feoffee for the arrerages incurred in the time of the feoffor. But in that caſe if the feoffor dieth, albeit the lord accept the rent or ſervice by the hand of the feoffee due in his time, he ſhall not loſe the arrerages, for now the law compelleth him to avow upon the feoffee (2), and that which the law compelleth him unto ſhall not prejudice him.

4 E. 3. 22.
7 E. 3. 8.
7 E. 4. 27.
29 H. 8. tit. avowrie.
Br. 111. li. 3. fol. 65, 66.
Pennant's caſe.
7 H. 4. 14.
2 E. 4. 6.
34 H. 6. 46.
37 H. 6.
29 H. 8. avowrie.

So it is, and for the ſame reaſon, if there be lord, meſne, and tenant, and the rent due by the meſne is behinde, and after the tenant fore-judge the meſne, and the lord receive the ſervices of the meſne which iſſue out of the tenancie, he ſhall not be barred of the arrerages which iſſued out of the meſnalty; and ſo if the rent be behinde, and the tenant dieth, the acceptance of the ſervices by the hand of the heire ſhall not barre him of the arrerages; for in theſe caſes, albeit the perſons be altered, yet the lord doth accept the ſervices of him which only ought to doe them (3).

(6 Rep. 58. b.)

But

(1) [See Note 225.]
(2) [See Note 224.]
(3) [See Note 225.]

But as long as the feoffor liveth the lord ſhall not be compelled to avow upon the feoffee, unleſſe he giveth the lord notice, and tender unto him all the arrerages. 4 E. 3. 22. 47 E. 3. 4.

But now by the ſtatute the lord may avow upon the lands ſo holden, as in lands within his fee or ſeigniory, without naming of any perſon certaine to bee tenant of the ſame, and without making of any avowrie upon any perſon certaine, as hath beene ſaid, which hath much altered the common law in the caſes aboveſaid, for the benefit and ſafety of the lord. 21 H. 8. cap. 91.

But yet theſe caſes are neceſſary to be knowne (for which purpoſe I have added them), for that the lord may avow ſtill at the common law if he will.

[270. a.]

Sect. 458.

AUTERMENT eſt lou le veray tenant eſt diſſeiſie, come en le cas avantdit; car ſi le veray tenant que eſt diſſeiſie, teigne del ſeignior per ſervice de chivaler et moruſt (ſon heire eſteant deins age), le ſeignior avera et ſeiſera le garde del heire, et iſſint n'avera il my le gard del feoffor que fiſt le feoffment en fee, &c. iſſint il eſt graund diverſity enter les deux caſes, &c.

OTHERWISE it is where the very tenant is diſſeiſed, as in the caſe aforeſaid; for if the very tenant who is diſſeiſed, hold of the lord by knights ſervice and dieth (his heire being within age), the lord ſhall have and ſeize the wardſhip of the heire, and ſo ſhall he not have the ward of the feoffor that made the feoffment in fee, &c. ſo there is a great diverſitie betweene theſe two caſes.

Of this ſufficient hath beene ſaid before. 12 H. 4. 13. 36 E. 3. tit. gard. 10. 6 H. 7. 9. 37 H. 6. 1. 32 H. 6. 27. 7 E. 6. tit. gard. Br. (Poſt. 345. b.)

Sect. 459.

*ITEM, ſi un home leſſa a un auter ſon terre pur terme d'ans, ſi le leſſor releſſa al leſſee tout ſon droit, &c. devant que le leſſee avoit enter en meſme le terre per force de meſme le leas, tiel releas eſt void, pur ceo que le leſſee n'avoit poſſeſſion en la terre al temps del releas fait, mes tantſolement un droit d'aver meſme la terre per force de meſme le leas. Mes ſi le leſſee enter en meſme la terre, et ent eit poſſeſſion per force de meſme le leas, donque tiel releas fait a luy per le feoffor, ou per ſon heire, eſt * ſufficient a luy per cauſe*

ALSO, if a man letteth to another his land for terme of yeares, if the leſſor releaſe to the leſſee all his right, &c. before that the leſſee had entred into the ſame land by force of the ſame leaſe, ſuch releaſe is void, for that the leſſee had not poſſeſſion in the land at the time of the releaſe made, but only a right to have the ſame land by force of the leaſe. But if the leſſee enter into the land, and hath poſſeſſion of it by force of the ſaid leaſe, then ſuch releaſe made to him by the feoffor, or by his heire, is

* *bon et*, added L. and M. and Roh.

cauſe del privitie que per force del leas eſt perenter eux, &c. is ſufficient to him by reaſon of the privitie which by force of the leaſe is between them, &c. (1)

49 E. 3. 26. 32 H. 6. 8. 37 H. 6. 18. 22 E. 4. 37. 4 H. 7. 10. 15 H. 7. 14.

"*DEVANT que le leſſee avoit enter, &c.*" For before entry the leſſee hath but *intereſſe termini*, an intereſt of a terme, and no poſſeſſion, and therefore a releaſe which enures by way of enlarging of an eſtate cannot worke without a poſſeſſion (2), for before poſſeſſion there is no reverſion; and yet if a tenant for twenty yeares in poſſeſſion make a leaſe to *B.* for five yeares, and *B.* enter, a releaſe to the firſt leſſee is good, for he had an actuall poſſeſſion, and the poſſeſſion of his leſſee is his poſſeſſion. And ſo it is if a man make a leaſe for yeares, the remainder for yeares, and the firſt leſſee doth enter, a releaſe to him in the remainder for yeares is good to enlarge his eſtate (3).

22 E. 4. Surrender, 6. (Poſt. 273. a.)

But if a man make a leaſe for yeares to beginne preſently, reſerving a rent, if before the leſſee doth enter the leſſor releaſeth all the right that hee hath in the land, albeit this releaſe cannot enlarge his eſtate, yet it ſhall in reſpect of the privity extinguiſh the rent. And ſo it is if a leaſe be made to beginne at *Michaelmas*, reſerving a rent, and before the day the leſſor releaſe all the right that hee hath in the land, this cannot enure to enlarge the eſtate but to extinguiſh the rent in reſpect of the privity, as it was reſolved [*b*] in the exchequer, which I obſerved.

(Ant. 46. b.)

[270. b.]

[*b*] Mich. 39 & 40 Eliz. in Scaccario, betweene ſir Henrie Woodhouſe and ſir William Paſton.

A man granteth the next avoidance of an advowſon to two, the one of them may before the church become void releaſe to the other; for although the grantor cannot releaſe to them to increaſe their eſtate, becauſe their intereſt is future, and not in poſſeſſion, yet one of them to extinguiſh his intereſt may releaſe to the other in reſpect of the privity. But after the church become void, then ſuch a releaſe is void, becauſe then it is (as it were) but a thing in action. And this was reſolved [*c*] by the whole court of common pleas, which I myſelfe heard and obſerved. And by conſequent in the caſe of *Littleton*, if a leaſe for yeares be made to two, albeit the leſſor before they enter cannot releaſe to them to enlarge their eſtate, yet one of them may before entry releaſe to the other.

[*c*] Paſch. 38 Eliz. in quare impedit per Bennet, verſ. l'eveſque de Norwich in communi banco.

Pl. Com. 423.

"*Mes tantſolement un droit, &c.*" Which is not ſo to be underſtood that he hath but a naked right, for then he could not grant it over; but ſeeing he hath *intereſſe termini*, before entrie, he may grant it over, albeit for want of an actuall poſſeſſion, he is not capable of a releaſe to enlarge his eſtate.

"*Mes ſi le leſſee enter en meſme le terre, &c.*" This is evident. And herein note a diverſity betweene a leaſe for life, and for yeares, for before the leſſee for yeares enter, a releaſe cannot be made unto him: but if a man make a leaſe for life, the remainder for life, and the firſt leſſee dieth, a releaſe to him in the remainder and to his heires is good before hee doth enter to enlarge his eſtate,

(1) On releaſes which operate by enlargement, ſee poſt. 273. a.

(2) [See Note 226.]

(3) [See Note 227.]

eſtate, for that he hath an eſtate of a freehold in law in him, which may be enlarged by releaſe before entrie.

And where our author ſpeaketh only of a leſſee for yeares, the ſame law it is of a tenant by ſtatute merchant or ſtaple, or tenant by *elegit*, or the like.

25 E. 3. 53. 31 E. 3. Confirmat. 14. 31 Aſſ. Pl. 13.

Sect. 460.

EN meſme le maner eſt, come il ſemble, ou leaſe eſt fait a un home a tener de le leſſor a ſa volunt, per force de quel leas le leſſee eit poſſeſſion: ſi le leſſor en ceſt caſe fait un releas al leſſee de tout ſon droit, &c. ceſt releas eſt aſſets bon pur le privity que eſt perenter eux; car en vain ſerra de faire eſtate per un liverie de ſeiſin a un auter, lou il ad poſſeſſion de meſmes les tenements per le leas de meſme celuy devant, &c.

IN the ſame manner it is, as it ſeemeth, where a leaſe is made to a man to hold of the leſſor at his will, by force of which leaſe the leſſee hath poſſeſſion: if the leſſor in this caſe make a releaſe to the leſſee of all his right, &c. this releaſe is good enough for the privitie which is betweene them; for it ſhall bee in vaine to make an eſtate by a livery of ſeiſin to another, where he hath poſſeſſion of the ſame land by the leaſe of the ſame man before, &c.

* Sed contrarium tenetur, P. 2 Ed. 4. *per touts les juſtices.*

But the contrarie is holden, *Paſch.* 2 *E.* 4. by all the juſtices *.

BY theſe two Sections is to be obſerved a diverſity between a tenant at will, and a tenant at ſufferance; for a releaſe to a tenant at will is good, becauſe betweene them there is a poſſeſſion with a privity; but a releaſe to a tenant at ſufferance is void, becauſe he hath a poſſeſſion without privity. As if leſſee for yeares hold over his terme, &c. a releaſe to him is void, for that there is no privity betweene them; and ſo are the books that ſpeake of this matter to be underſtood (1).

21 H. 6. 37. 2 E. 4. 6. b. 7 E. 4. 27. 8 E. 4. 16. 29 H. 6. Releaſe 6. (5 Rep. 13. 2 Sid. 153. Ant. 47. Cro. Jac. 169.)

"*Sed contrarium tenetur, &c.*" This is of a new addition, and the booke here cited ill underſtood, for it is to be underſtood of a tenant at ſufferance.

Sect. 461.

MES lou home de ſa teſte demeſne occupia terres ou tenements a la volunt celuy que ad † le franktenement, et tiel occupier ne claima

BUT where a man of his owne head occupieth lands or tenements at the will of him which hath the freehold, and ſuch occupier claimeth

* This paragraph is not in L. and M. nor Roh. † *ent* added L. and M. and Roh.

(1) [See Note 228.]

claima riens forſque a volunt, &c. ſi celuy que ad le franktenement voile releaſer tout ſon droit al occupier, &c. tiel releaſe eſt void, pur ceo que nul privitie eſt perenter eux per leaſe fait al occupier, ne per auter manner, &c.

claimeth nothing but at will, &c. if hee which hath the freehold will releaſe all his right to the occupier, &c. this releaſe is void, becauſe there is no privitie betweene them by the leaſe made to the occupier, nor by other manner, &c.

Vide Sect. 68. (1 Roll Abr. 853. Ant. 57. Cro. Car. 303.)

"*DE ſa teſte demeſne occupia.*" Hee doth not ſay, *de ſa teſte demeſne enter*, &c. ſo as this is to bee underſtood of a tenant at ſufferance, *viz.* where a man commeth to the poſſeſſion firſt lawfully, and holdeth over. [271. a.]

[m] Temps H. 8. tit. tenant a volunt. Br. 15. 2 E. 4. 38. 18 E. 4. 25. 39 E. 3. 28. 12 E. 3. Aſſ. 86. 11 E. 3. ibid. 87. 12 Aſſ. 21. 13 E. 3. Aſſ. 92. 28 Aſſ. 11. 34 Aſſ. 10. 10 E. 3. 41. 8 E. 3. 63. (1 Roll. Abr. 662. Poſt. 277.)

[m] For if a man entreth into land of his owne wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but hee is a diſſeiſor (1), and then the releaſe to him is good; or if the owner conſented thereunto, then hee is a tenant at will, and that way alſo the releaſe is good. But there is a diverſitie when one commeth to a particular eſtate in land by the act of the partie, and when by act in law; for if the gardein hold over, he is an abator, becauſe his intereſt came by act in law (2).

Vide 2 part of the Inſtitutes. Marlb. cap. 16. 10 E. 4. 9. 10. (1 Roll. Abr. 861. Ant. 56. a.)

Old N. B. 117. 137. Lib. 3. fo. 28. Walker's caſe. Lib. 4. fol. 123, 124. Vide Sect. 454.

"*Nul privitie.*" *Privitie* is a word common aſwell to the Engliſh as to the French, and in the underſtanding of the common law is fourefold.

1. As privies in eſtate, whereof *Littleton* here ſpeaketh; as betweene the donor and donee, leſſor and leſſee, which privitie is ever immediate.

(8 Rep. 42. b.)

2. Privies in bloud; as the heire to the anceſtor, or betweene coparceners, &c.

(Ant. 242. a.)

3. Privies in repreſentation; as executors, &c. to the teſtator.

And fourthly, privities in tenure, as the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

Sect. 462, 463.

ITEM, ſi home enfeoffe auters homes de ſa terre ſur confidence, et al entent de performer ſa darreine volunt, et le feoffor occupiaſt meſme la terre a la volunt de ſes feoffees, et puis les feoffees releſſont per lour fait a lour feoffor tout lour droit, &c. ceo ad eſte un queſtion, ſi tiel releaſe ſoit bon ou non. Et aſcuns ont dit, que tiel releaſe eſt voyd, pur ceo que nul privitie fuit perenter les feoffees et lour feoffor, entant

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to performe his laſt will, and the feoffor occupieth the ſame land at the will of his feoffees, and after the feoffees releaſe by their deed to their feoffor all their right, &c. this hath beene a queſtion if ſuch releaſe be good or no. And ſome have ſaid, that ſuch releaſe is void, becauſe there was no privitie betweene

(1) [See Note 229.] (2) [See Note 230.]

entant que nul leaſe fuit fait apres tiel feoffment per les feoffees al feoffor, a tener a lour volunt. Et aſeuns ont dit le contrarie, et ceo per deux cauſes.

betweene the feoffees and their feoffor, inſomuch as no leaſe was made after ſuch feoffment by the feoffees to the feoffor, to hold at their will: and ſome have ſaid the contrarie, and that for two cauſes.

Sect. 463.

UN eſt, que quant tiel feoffment eſt fait ſur confidence a performer la volunt del feoffor, il ſerra intendue per la ley, que le feoffor doit maintenant occupier la terre a la volunt de ſes feoffees; et iſſint il eſt tiel manner de privitie enter eux, ſicome home fait un feoffment as auters, et ils incontinent ſur le feoffment voylent et granteront, que lour feoffor occupiera la terre a lour volunt, &c.

ONE is, that when ſuch feoffment is made upon confidence to performe the will of the feoffor, it ſhall bee intended by the law, that the feoffor ought preſently to occupie the land at the will of his feoffees; and ſo there is the like kinde of privitie betweene them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor ſhall occupy the land at their will, &c.

HERE is a queſtion moved, and the reaſons of both ſides ſhewed, and as it hath beene obſerved, the latter opinion is the better, being *Littleton*'s owne opinion. 12 E. 4. 12. b. 15 E. 4. 9 H. 7. 25. Vide Sect. 302. 176. 340.

"*Il ſerra entendue per la ley que le feoffor doit maintenant occupie la terre a la volunt de les feoffees.*" For intendments of law mentioned by our author ſee the Section in the margent. 4 E. 4. 8. b. 9 H. 7. fol. ultimo, 15 H. 7. 2. b.

14 H. 8. 9. a. Sect. 99, 100. 110. 367. 377. 393. 406. 440.

Here is to bee obſerved the intendment of law, that when a feoffment is made to a future uſe, as to the performance of his laſt will, the feoffees ſhall bee ſeiſed to the uſe of the feoffor and of his heires in the meane time. 35 H. 6. Subpena, 22. 15 H. 7. 12. b. 37 H. 6. 36. 11 H. 4. 52.

[271. b.]

7 H. 4. 22. 1 Mar. 111. Dier. (6 Rep. 18. a.) (Ant. 111. b. 112. a.) (2 Rep. 58.)

Ipſæ etenim leges cupiunt ut jure regantur.

And reaſon would that ſeeing the feoffment is made without conſideration, and the feoffor hath not diſpoſed of the profits in the meane time, that by conſtruction and intendment of law the feoffor ought to occupie the ſame in the meane time. And ſo it is when the feoffor diſpoſeth the profits for a particular time *in præſenti*, the uſe of the inheritance ſhall be to the feoffor and his heires, as a thing not diſpoſed of; wherein it is to be obſerved, that lands and tenements conveyed upon confidences, uſes, and truſts, are to be ruled and decided, if queſtion groweth upon the confidences, uſes or truſts, by the judges of the law; for that it appeareth (1 Roll. Abr. 859. Sid. 458. Dyer. 186. a.) 35 H. 6. Subpena, 22. 30 H. 6. tit. Deviſe.

appeareth by this and the next Section, they are within the entendment and conſtruction of the lawes of the realme (1).

(Ant. 111. b. 112. a.)

And it is to be obſerved (as hath beene ſaid) that there is a diverſitie betweene a feoffment of lands at this day upon confidence, or to the intent to performe his laſt will, and a feoffment to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates, as hee ſhall appoint by his laſt will: for, in the firſt caſe, the land paſſeth by the will, and not by the feoffment; for after the feoffment the feoffor was ſeiſed in fee ſimple, as he was before; but in the latter caſe, the will purſuing his power is but a direction of the uſes of the feoffment, and the eſtates paſſe by execution of the uſes, which were raiſed upon the feoffment; but in both caſes the feoffees are ſeiſed to the uſe of the feoffor and his heires in the mean time: and all this and much more concerning this matter hath beene adjudged.

Lib. 6. fol. 17, 18. Sir Edward Clere's caſe.

Note, uſes are raiſed either by tranſmutation of the eſtate, as by fine, feoffment, common recoverie, &c. or out of the ſtate of the owner of the land, by bargaine and ſale by deed indented and inrolled, or by covenant upon lawfull conſideration, whereof you may read plentifully in my *Reports*.

Dillon & Frayn's caſe, l. 1. &c. fol. 113.

A feoffee to the uſe of *A.* and his heires, before the ſtatute of 27 *H.* 8. for money bargaineth and ſelleth the land to *C.* and his heires, who hath no notice of the former uſe; yet no uſe paſſeth by this bargaine and ſale, for there cannot be two uſes in *eſſe*, of one and the ſame land; and ſeeing there is no tranſmutation of poſſeſſion by the terre-tenant, the former uſe can neither be extinct nor altered. And if there could be two uſes of one and the ſame land, then could not the ſaid ſtatute execute either of them for the uncertaintie. But if *A.* diſſeiſe one to the uſe of *B.* and *A.* doth bargaine and ſell the land for money to *C.*, *C.* hath an uſe; and here be two uſes of one land, but of ſeverall natures; the one, *viz.* upon the bargaine and ſale to be executed by the ſtatute, and the other not.

(2 Roll. Abr. 797. 1 Rep. 129. b. 192. b. Stat. 27 H. 8. c. 10. Plow. 348. 1 Rep. 127. Sid. 26.)

(Ant. 22. b.)

[272. a.]

But ſince *Littleton* wrote, all uſes are transferred by act of Parliament [c] into poſſeſſion, ſo as the caſe which *Littleton* here puts is thereby altogether altered. Yet it is neceſſarie to bee knowen, what the common law was before the making of the ſtatute, and may ſerve for the knowledge of the law in like caſe.

[c] 27 H. 8. cap. 10. (Dr. and Stud. 98. a.)

"*Incontinent ſur le feoffment.*" *Quæ incontinenti ſiunt in eſſe videntur.*

"*A lour volunt, &c.*" Here is implyed, everie tenancie at will is at the will of both parties, as before in his proper place hath beene ſhewed.

(1) [See Note 231.]

Sect. 464.

*UN auter cauſe ils allegeont, que ſi tiel terre vault xl. s. per an, &c. donque tiel feoffor ſerra jure en aſſiſes et en auters enquefts en plees realx, et auxy en plees perſonals, de quel graund ſum que les plaintifes voilent counter, *&c. Et ceo eſt per le common ley de la terre. Ergo, ceo eſt pur un graund cauſe. Et la cauſe eſt, que la ley voet que tiels feoffors et lour heires doient occupier, &c. et prender et enjoyer touts maner de profits, iſſues, et revenues, &c. ſicome les tenements fueront lour meſmes, ſans interruption de les feoffees, nient obſtant tiel feoffment. Ergo, meſme la ley done privitie perenter tiels feoffors et les feoffees ſur confidence, &c. pur queux cauſes ils ont dit, que tiels releaſes faits per tiels feoffees ſur confidence a lour feoffor ou a ſes heires, &c. iſſint occupant la terre, † ſerra aſſets bon: et ceſt le melior opinion, come il ſemble, &c.*

‡ Quære, *car ceo ſemble nul ley a cet jour.*

ANOTHER cauſe they alleage, that if ſuch land bee worth fortie ſhillings a yeare, &c. then ſuch feoffor ſhall be ſworn in aſſiſe and other enqueſts in plees reals, and alſo in plees perſonals, of what great ſum ſoever the plaintiffe will declare, &c. And this is by the common law of the land. *Ergo*, this is for a great cauſe. And the cauſe is, for that the law will that ſuch feoffors and their heires ought to occupie, &c. and take and enjoy all manner of profits, iſſues, & revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithſtanding ſuch feoffment. *Ergo*, the ſame law giveth a privitie between ſuch feoffors and the feoffees upon confidence, &c. for which cauſes they have ſaid, that ſuch releaſes made by ſuch feoffees upon confidence to their feoffor or to his heirs, &c. ſo occupying the lands, ſhall bee good enough: and this is the better opinion, as it ſeemeth.

Quære, for this ſeemeth no law at this day.

BY the ſtatute of 2 *H.* 5. cap. 3. ſtatute 2, it is enacted, that, in three caſes, he that paſſeth in an enqueſt, ought to have lands and tenements to the value of fortie ſhillings, *viz.* Firſt, upon triall of the death of a man. Secondly, in plea reall betweene partie and partie. And thirdly, in plea perſonall, where the debt or the dammages in the declaration amount unto fortie markes (1). And it is worth the noting, that the judges that were at the making of that ſtatute did conſtrue it by equitie: for where the ſtatute ſpeakes in the disjunctive debt or dammages, they adjudged that where the debt and damages amounted to fortie markes, that it was within the ſtatute. *Forteſcue* [*f*] ſaith, *Ubi damna vel debitum in perſonalibus actionibus non excedunt quadraginta marcas monetæ Anglicanæ, hinc non requiritur, quòd juratores in actionibus hujuſmodi tantum expendere poſſint: habebunt tamen terram vel redditum ad valorem competentem, juxta diſcretionem juſtitiariorum, &c.* And foraſmuch as at the time of the making of this ſtatute, the

(Ant. 156. b.) 28 H. 8. Dy. fol. 9. Vid. W. 2. cap. 38. L'eſtat. de 21 E. 1. de juratis ponendis in aſſiſis, &c. (Forteſcue 62. a. 27 El. c. 6. Ant. 157. a.)

9 H. 5. fol. 5. [*f*] Forteſc. cap. 15.

* *&c.* not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.
‡ This paragraph not in L. and M. nor Roh.

(1) [See Note 232.]

the greater part of the lands in England in thoſe troubleſome and dangerous times (when that unhappie controverſie betweene the houſes of Yorke and Lancaſter was begun) were in uſe; and the ſtatute was made to remedie a miſchiefe, that the ſheriffe uſed to return ſimple men of ſmall or no underſtanding; and [272. b.] therefore the ſtatute provided that hee ſhould returne ſufficient men: and albeit in law the land was the feoffees, yet for that they had it but upon truſt, and *ceſty que uſe* tooke the whole profits, as our author here ſaith, and in equity and conſcience the land was his, therefore the judges, for advancement and expedition of juſtice, extended the ſtatute (againſt the letter) to *ceſty que uſe*, and not to the feoffees (1).

15 H. 7. 13. b. 13 H. 7. 7. b. 5 E. 4. 7. a.

[n] 3 H. 6. 39. Challeng. 19. 21 H. 6. 39. (Ant. 157. a.)

[n] But note, if a man hath a freehold *pur terme d'auter vie*, or is ſeiſed in his wife's right, and is returned on a jurie, yet if after he be returned, *ceſty que vie*, or his wife die, hee may be challenged; and ſo it is if after the returne the lands be evicted.

"*Et ceo eſt per le common ley.*" Here three things are to be obſerved. Firſt, that the ſureſt conſtruction of a ſtatute is by the rule and reaſon of the common law. Secondly, that uſes were at the common law. Thirdly, that now ſeeing the ſtatute [g] of 27 *H.* 8. *cap.* 10. which hath beene enacted ſince *Littleton* wrote, hath transferred the poſſeſſion to the uſe, this caſe holdeth not at this day; but this latter opinion before that ſtatute was good law, as *Littleton* here taketh it.

[g] 27 H. 8. cap. 10.

(8 Rep. 42. b.)

"*Meſme la ley done privitie, &c.*" Hereof it followeth, that when the law gives to any man any eſtate or poſſeſſion, the law giveth alſo a privitie and other neceſſaries to the ſame, and *Littleton* concludeth it with an illative, *ergo, meſme la ley done privitie*, which is verie obſervable for a concluſion in other caſes.

(Ante 156. b.)

And the (*quære*) here made in the end of this Section is not in the originall, but added by ſome other, and therefore to be rejected.

27 El. cap. 6.

Alſo ſince *Littleton* wrote, the ſaid ſtatute of 2 *H.* 5. is altered; for where that ſtatute limited fortie ſhillings, now a latter ſtatute hath raiſed it to foure pounds, and ſo it ought to be contained in the *venire facias*.

Pl. Com. 352. b. in Delamere's caſe, and 349. b. Lib. 1. fol. 121, 122. 127. 140. in Chudleye's caſe. Lib. 2. fol. 58. 78. Lib. 6. fol. 64. Lib. 7. fol. 13. & 24.

Nota, an uſe is a truſt or confidence repoſed in ſome other, which is not iſſuing out of the land, but as a thing collaterall, annexed in privitie to the eſtate of the land, and to the perſon touching the land, *ſcilicet*, that *ceſty que uſe* ſhall take the profit, and that the terre-tenant ſhall make an eſtate according to his direction. So as *ceſty que uſe* had neither *jus in re*, nor *jus ad rem*, but only a confidence and truſt, for which he had no remedie by the common law, but for breach of truſt his remedie was only by *ſubpœna* in chancerie: and yet the judges, for the cauſe aforeſaid, made the ſaid conſtruction upon the ſaid ſtatute.

Now how jurors ſhall bee returned, both in common plees, and alſo in plees of the crowne, and in what manner evidence ſhall be given to them, and how they ſhall be kept, untill they give their verdict, you may read in *Forteſcue*, and therefore need not to be here inſerted.

Forteſc. cap. 25, 26, 27.

(1) See Lord Bacon's reading on the ſtatute of uſes, p. 8. *accord.* edit. 1785.

Sect.

Sect. 465.

*ITEM, releaſes ſolonque le matter en fait, aſcun foits ont lour effect per force d'enlarger l'eſtate celuy a que le releaſe eſt fait. Sicome jeo leſſa certain terre a un home pur terme des ans, per force de que il eſt en poſſeſſion, et puis jeo releſſa a luy tout le droit que jeo aye en le terre ſans pluis parolx mitter enle fait, et deliver a luy le fait, donques il ad eſtate forſque pur terme de ſa vie. Et la cauſe eſt, pur ceo que quant le reverſion ou le remainder eſt en un home lequel voile enlarger per ſon releas l'eſtate le tenant, &c. il n'avera pluis greinder eſtate, mes en * tiel manner et forme ſicome † tiel feoffor fuit ſeiſie en fee, et voliuit per ſon fait faire eſtate a un en certaine forme, et deliver a luy ſeiſin per force de meſme le fait: ſi en tiel fait de feoffement ne ſoit aſcun parol de enheritance, ‡ donques il ad forſque eſtate pur terme de vie; et iſſint il eſt en tiels releaſes faits per ‖ eux en la reverſion ou en le remainder. Car ſi jeo leſſa la terre a un home pur terme de ſa vie, et puis jeo releſſa a luy tout mon droit ſauns plus dire en le releas, ſon eſtate n'eſt my enlarge. Mes ſi jeo releſſa a luy et a ſes heires, donques il ad fee ſimple; et ſi jeo releſſa a luy et a ſes heires de ſon corps engendres, donques il ad fee taile, &c. Et iſſint il covient de ſpecifier en le fait quel eſtate celuy a que le releas eſt fait avera.*

ALSO, releaſes according to the matter in fact, ſometimes have their effect by force to enlarge the ſtate of him to whom the releaſe is made. (1) As if I let certaine land to one for terme of yeares, by force whereof hee is in poſſeſſion, and after I releaſe to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath hee an eſtate but for terme of his life. And the reaſon is, for that when the reverſion or remaynder is in a man who will by his releaſe inlarge the eſtate of the tenant, &c. hee ſhall have no greater eſtate, but in ſuch manner and forme as if ſuch leſſor were ſeiſed in fee, and by his deed will make an eſtate to one in a certain forme, and deliver to him ſeiſin by force of the ſame deed: if in ſuch deed of feoffement there be not any word of inheritance, then he hath but an eſtate for life; and ſo it is in ſuch releaſes made by thoſe in the reverſion or in the remainder. For if I let land to a man for terme of his life, and after I releaſe to him all my right without more ſaying in the releaſe, his eſtate is not enlarged. But if I releaſe to him and to his heires, then he hath a fee ſimple; and if I releaſe to him and to his heires of his bodie begotten, then hee hath a fee taile, &c. And ſo it behoveth to ſpecifie in the deed what eſtate hee to whom the releaſe is made ſhall have.

IT is a certaine rule, that when a releaſe doth enure by way of enlarging of an eſtate, that there muſt be privitie of eſtate, as betweene leſſor and leſſee, donor and donee. For if *A.* make a leaſe to *B.* for life, and the leſſee maketh a leaſe for yeares, [273. a.] and after *A.* releaſeth to the leſſee for yeares, and his heires, this (Poſt. 296. a.)

Flet. lib. 5. cap. 34. 15 H. 7. 14. 22 E. 4. 4.

* *tiel—la*, L. and M. and Roh.
† *ſ* added in L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
‖ *per eux* not in L. and M. nor Roh.

(1) [See Note 233.]

this releaſe is void to enlarge the eſtate, becauſe there is no privity betweene *A.* and the leſſee for yeares.

(Ant. 270. a.) If a man make a leaſe for twenty yeares, and the leſſee make a leaſe for ten yeares, if the firſt leſſor doth releaſe to the ſecond leſſee, and his heires, this releaſe is void for the cauſe aforeſaid.

For the ſame cauſe, if the donee in taile make a leaſe for his owne life, and the donor releaſe to the leſſee and his heires, this releaſe is void to enlarge the eſtate.

(Ant. 264. a. Poſt. 285. b. Sect. 490, 491.) And as privity is neceſſarie in this caſe, ſo privity only is not ſufficient. As if an infant make a leaſe for life, and the leſſee granteth over his eſtate with warranty, the infant at full age bringeth a *dum fuit infra ætatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaſeth to him and his heires; here is privitie in law, and a tenancie in ſuppoſition of law: and yet becauſe hee *in rei veritate* hath no eſtate, it cannot enure to him by way of inlargement; for how can his eſtate be inlarged that hath not any?

(Ant. 53. a. 54. a.) If a tenant by the courteſie grant over his eſtate, yet he is tenant as to an action of waſte, attornement, &c. and yet a releaſe to him and his heires cannot enure to enlarge his eſtate that hath no eſtate at all.

But if a man make a leaſe for yeares, the remainder for life, a releaſe by the leſſor to the leſſee for yeares, and to his heires, is good, for that he hath both a privity and an eſtate; and the releaſe alſo to him in the remainder for life and his heires, is good alſo.

(2 Roll. Abr. 400.)

48 E. 3. 16. a. per Perſay et Finchden. 41 E. 3. 17. a. 7 E. 4. 17. (Ant. 54. a.) If I grant the reverſion of my tenant for life to another for life, now ſhall not I have an action of waſte (2): but if I releaſe to the grantee for life, and his heires, now hee hath the fee ſimple, and ſhall puniſh the waſte done after (1). [273. b.]

It is further to be obſerved, that to a releaſe that enureth by way of enlargement of the eſtate, there is not only required privity, as hath beene ſaid, and an eſtate alſo, but ſufficient words in law to raiſe or create a new eſtate. If a man make a leaſe to *A.* for terme of the life of *B.* and after releaſe to *A.* all his right in the land, by this *A.* hath an eſtate for terme of his owne life; for a leaſe for terme of his owne life is higher in judgement of law than an eſtate for terme of another man's life.

(Ant. 42. a.)

16 H. 6. releaſe 45. 22 E. 2. releaſe. Statham. [a] 13 H. 4. 6. Stanf. prer. 7. b. 18 E. 4. 5. 22 Aſſ. 12. 11 H. 7. 19. 10 H. 6. 11. (Poſt. 299. a. Ant. 270. b.) If a feme covert be tenant for life, a releaſe to the huſband and his heires is good, for there is both privity and an eſtate in the huſband, whereupon the releaſe may ſufficiently enure by way of enlargement [a]; for by the intermarriage he gaineth a freehold in his wife's right.

"*Tout le droit.*" *Vide* Sect. 650.

"*Pur terme des ans.*" So it is if a releaſe be made to tenant by ſtatute ſtaple, or merchant, or tenant by *elegit*, as hath beene ſaid; and ſo likewiſe to gardeine in chivalrie which holdeth in for the value, by him in the reverſion of all his right in the land, by this a freehold paſſeth for the life of him to whom the releaſe is made, for that is the greateſt eſtate that can paſſe without apt words of inheritance.

If

(2) [See Note 234.] (1) [See Note 235.]

If a man make a leaſe for ten yeares, the remainder for twenty yeares, he in the remainder releaſeth all his right to the leſſee, he ſhall have an eſtate for thirty yeares; for one chattle cannot drowne another, and yeares cannot be conſumed in yeares. (1 Leo. 303. 323. Ant. 193. b.)

"*Mes ſi jeo releaſe a luy et a ſes heires, &c.*" Here it is to bee obſerved, that when a releaſe doth enure by way of enlargement of an eſtate, no inheritance either in fee ſimple or fee taile, can paſſe without apt words of inheritance.

But there is a diverſity betweene a releaſe that enureth by way of enlargement of the ſtate and by way of *mitter l'eſtate* (2); for when an eſtate paſſeth by way of *mitter l'eſtate*, there ſometime there need not any words of inheritance. As if a joynt eſtate be made to the huſband and to his wife, and to a third perſon and to their heires, the third perſon releaſeth all his right to the huſband, this ſhall enure by way of *mitter l'eſtate*, and not by way of enlargement of the eſtate, becauſe the huſband had a fee ſimple, and needeth not to have any words of inheritance. So it is if the releaſe had been made to the wife. 9 Eliz. Dier. 263. 10 Eliz. Bendloes. Litt. lib. 3. fol. 68, 69, 70. b. 130. b. See before in the chapter of Fee Simple, 9.

[*b*] If there be three joyntenants, and one releaſe to one of the other all his right, this enureth by way of *mitter l'eſtate*, and paſſeth the whole fee ſimple without theſe words (heires). But if there be two joyntenants, and the one of them releaſe all his right to the other, this doth not to all purpoſes enure by way of *mitter l'eſtate*, for it maketh no degree, and hee to whom the releaſe is made ſhall for many purpoſes be adjudged in from the firſt feoffor, and this releaſe ſhall veſt all in the other joyntenant without theſe words (heires). [*b*] 40 E. 3 41. 46 E. 3. 19 H. 6. 33 H. 6. 5. 10 E. 4. 3.

But if there be two coparceners, and the one releaſe all his right to the other, this ſhall enure by way of *mitter l'eſtate*, and ſhall make a degree, and without theſe words (heires) ſhall paſſe the whole fee ſimple. And it is to be obſerved, that to releaſes that enure by way of *mitter l'eſtate*, there muſt be privity of eſtate at the time of the releaſe. 10 E. 4. 3. b. 37 H. 8. tit. alienation. Br. 31. 31 H. 4. 8. 40 Aſſ. 5. 9 Eliz. Dier. 263.

If two coparceners be of a rent, and the one of them take the ter-tenant to huſband, the other may releaſe to her, notwithſtanding the rent be in ſuſpence, and it ſhall enure by way of *mitter l'eſtate*, and ſhe may releaſe alſo to the ter-tenant, and that ſhall enure by way of extinguiſhment: but if ſhe releaſe to her ſiſter and to her huſband, it is good to bee ſeene how it ſhall enure. (2 Roll. Abr. 405. 10 E. 4. 3. b.)

Littleton having now ſpoken of releaſes that enure by way of enlargement of the eſtate, and of releaſes that enure by way of *mitter l'eſtate*, proceedeth to releaſes that enure by way of *mitter le droit*. So as of that which hath beene and ſhall bee ſaid by our author of releaſes, it appeareth that ſome doe enure by way of enlargement of eſtate, ſome by way of *mitter l'eſtate*, ſome by way of *mitter le droit*, by way of entrie and feoffment, and ſome by extinguiſhment. Vid. Litt. fol. 68, 69. (8 H. 4. 8.) (Poſt. 230. a.)

(2) [See Note 236.]

Sect.

Sect. 466.

[274. a.]

ITEM, aſcun foits releaſes urera de mitter, et veſter le droit celuy que fait le releaſe a celuy a que le releas eſt fait. Sicome un home eſt diſſeiſi, et il releſſa a ſon diſſeiſor tout le droit que il ad, en ceſt cas le diſſeiſor ad ſon droit, iſſint que lou ſon eſtate adevant fuit torcious, ore per tiel releas il eſt fait loyal et droiturel.

ALSO, ſometimes releaſes ſhall enure *de mitter*, and veſt the right of him which makes the releaſe to him to whom the releaſe is made. As if a man be diſſeiſed, and he releaſeth to his diſſeiſor all his right, in this caſe the diſſeiſor hath his right, ſo as where before his ſtate was wrongfull, now by this releaſe it is made lawfull and right (1).

"*ET il releſſa a ſon diſſeiſor, &c.*" This releaſe ſo putteth the right of the diſſeiſee to the diſſeiſor, that it changeth the quality of the eſtate of the diſſeiſor; for where his eſtate was before wrongfull, it is by this releaſe made lawfull. But how farre, and to what reſpects his eſtate is changed, ſhall be ſaid hereafter in this chapter in his proper place.

Sect. 467.

MES hic nota, *que quant home eſt ſeiſi en fee ſimple d'aſcun terres ou tenements, et un auter voile releaſer a luy tout le droit que il ad en meſmes les tenements, il ne beſoigne de parler de les heires celuy a que le releas eſt fait, pur ceo que il avoit fee ſimple al temps de releas fait. Car ſi releas fuit fait a luy * pur un jour, ou pur un heure, ceo ſerroit auxy fort a luy en ley, ſicome il uſt releas a luy et a ſes heires. Car quant ſon droit fuit ale de luy a un foits per ſon releas ſans aſcun condition, &c. a celuy que ad fee ſimple, il eſt ale a touts jours.*

BUT here note, that when a man is ſeiſed in fee ſimple of any lands or tenements, and another will releaſe to him all the right which he hath in the ſame tenements, he needeth not to ſpeake of the heires of him to whom the releaſe is made, for that he hath a fee ſimple at the time of the releaſe made. For if the releaſe was made to him for a day, or an houre, this ſhall bee as ſtrong to him in law as if he had releaſed to him and his heires. For when his right was once gone from him by his releaſe without any condition, &c. to him that hath the fee ſimple, it is gone for ever.

"*IL ne beſoigne a parler de les heires, &c.*" And the reaſon of *Littleton* hereof is, for that the diſſeiſor hath a fee ſimple at the time of the releaſe made. And this appeareth by that which (Poſt. 280. a.) hath beene ſaid before, ſo as regularly hee that hath a fee ſimple at

* *et a ſes heires* added L. and M. and Roh.

(1) [See Note 237.]

at the time of the releaſe made of a right, &c. needeth not ſpeake of his heires.

" Car ſi releaſe fuit fait a luy pur un jour, &c." For the diverſity is betweene a releaſe of part of the eſtate of a right, and between a releaſe of a right in part of the land. And therefore *Littleton* here ſaith, that a releaſe of a right for a day or an houre is of as good force, as if he had releaſed his right to him and his heires. But if a man be diſſeiſed of two acres, he may releaſe his right in one of them, and yet enter into the other. Vide 6 E. 3. 17, 12 E. 4. tit. Defeent, F. 29. (Ant. 252. a.)

[274. b.] *" Sans diſcun condition, &c."* Herein is implyed two diverſities: firſt, betweene the quantity of the eſtate in a right, and the quality thereof; for albeit the diſſeiſee cannot releaſe part of the eſtate, as hath beene ſaid, yet may he releaſe his right upon condition, as here it appeareth by *Littleton* [c], and it agreeth with our bookes. [c] 4 E. 2. Releaſe 50. 43 Aſſ. 12. 17 Aſſ. 2. 31 Aſſ. 18. 21 H. 24.

Alſo here is another diverſity betweene a right, whereof *Littleton* putteth his caſe, which is favoured in law, and a condition created by the party which is odious in law, for that it defeateth eſtates. And therefore if a condition be releaſed upon condition, the releaſe is good, and the condition void.

What things may be done upon condition is too large a matter to handle in this place, our author having treated of Conditions before: only to give a touch of ſome things omitted there ſhall ſuffice. An expreſſe manumiſſion of a villeine cannot be upon condition, for once free in that caſe, and ever free; alſo an attornment to a grantee upon condition, the condition is void becauſe the grant is once ſettled. But this is to be underſtood of a condition ſubſequent, and not of a condition precedent; for in both thoſe caſes the condition precedent is good. But letters patents of denization made to an alien, may be either upon condition ſubſequent or precedent; and ſo may the king make a charter of pardon to a man of his life upon condition, as is aboveſaid. (6 Rep. 62. a. Poſt. 297. a. 300. b.) Rot. Parliament. 18 H. 6. num. 29 Ap Gwilliam's caſe. 10 E. 3. cap. 2. 3 H. 7. f. 6.

Sect. 468. (2 Roll. Abr. 406.)

*MES lou * home ad un reverſion en fee ſimple, ou un remainder en fee ſimple, al temps de releas fait, la s'il voyle releaſer al tenant pur terme d'ans, ou pur terme de vie, ou al tenant en le taile, il covient a determiner l'eſtate que celuy a que le releas eſt fait avera per force de meſme le releas, pur ceo que tiel releas enurera pur enlarger l'eſtate de celuy a que le releas eſt fait †.*

BUT where a man hath a reverſion in fee ſimple, or a remainder in fee ſimple, at the time of the releaſe made, there if he will releaſe to the tenant for yeares, or for life, or to the tenant in taile, hee ought to determine the eſtate which he to whom the releaſe is made ſhal have by force of the ſame releaſe, for that ſuch releaſe ſhall enure to enlarge the eſtate of him to whom the releaſe is made (1).

Of this ſufficient hath beene ſaid before.

* *home—ua*, L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 238.]

Sect.

Sect. 469.

*MES auterment eſt lou home ad forſque droit a la terre, et n'ad riens en le reverſion ne en le remainder en fait. Car ſi tiel home releſſa tout ſon droit a un que eſt tenant de le franktenement, tout ſon droit eſt ale, coment que nul mention ſoit fait de les heires celuy a que le releas eſt fait. Car ſi jeo leſſa terres ‖ a un home pur terme de ſa vie, ſi jeo puis releaſe a luy pur enlarger ſon eſtate, il covient que jeo releſſa a luy et a ſes heires de ſon corps engender, * ou a luy et a ſes heires, ou per tiels parols, A aver et tener a luy et a ſes heires † de ſon corps engendres, ‡ ou a les heires males de ſon corps engendres, ou tiels ſemblables eſtates, ou autrement il n'ad plus greinde eſtate que il avoit adevant.*

BUT otherwiſe it is where a man hath but a right to the land, and hath nothing in the reverſion nor in the remainder in deed. For if ſuch a man releaſe all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heires of him to whom the releaſe is made. For if I let lands to one for terme of his life, if I after releaſe to him to enlarge his eſtate, it behoveth that I releaſe to him and to his heires of his body engendred, or to him and his heires, or by theſe words, To have and to hold to him and to his heires of his bodie engendred, or to the heires males of his bodie engendred, or ſuch like eſtates, or otherwiſe hee hath no greater eſtate than hee had before. [275. a.]

(Ant. 266.) "*A UN que eſt tenant de franktenement.*" Here it appeareth, that to a releaſe of a right, made to any that hath an eſtate of freehold in deed or in law, no privitie at all is requiſite. As if a diſſeiſor make a leaſe for life, if the diſſeiſee releaſe to the leſſee, this is good, and directly within the rule of *Littleton*, becauſe the leſſee hath an eſtate of freehold, albeit there be no privitie. And ſo it is if a diſſeiſor make a leaſe to *A.* and his heires during the life of *B.* and *A.* dieth, a releaſe by the diſſeiſee to his heire, before hee doth actually enter, is good.

Sect. 470.

(Poſt. 327.)

MES ſi mon tenant a terme de vie leſſa meſme la terre ouſter a un auter pur terme de vie de ſon leſſee, le remainder a un auter en fee, ore ſi jeo releſſa a celuy a que mon tenant leſſaſt pur terme de vie, § ceo ſerra barre a touts jours, coment que nul mention ſoit fait de ſes heires, pur ceo que

BUT if my tenant for life letteth the ſame land over to another for terme of the life of his leſſee, the remainder to another in fee, now if I releaſe to him to whom my tenant made a leaſe for terme of life, I ſhall bee barred for ever, albeit that no mention be made of his heires, for

‖ *ou tenements* added L. and M. and Roh.
* *ou* not in L. and M. nor Roh.
† *males* added L. and M. and Roh.
‡ *ou a les heires males de ſon corps engendres* not in L. and M. nor Roh.
§ *ceo—jeo*, L. and M. and Roh.

que al temps de releaſe fait jeo avoy nul reverſion, mes tantſolement un droit d'aver la reverſion. Car per tiel leas, et le remainder ouſter, que mon tenant fiſt en ceo cas, mon reverſion fuit diſcontinue, ‖ &c. et tiel releaſe urera a celuy en le remainder, d'aver advantage de ceo, auxibien come al tenant a terme de vie.

for that at the time of the releaſe made I had no reverſion, but only a right to have the reverſion. For by ſuch a releaſe, and the remainder over, which my tenant made in this caſe, my reverſion was diſcontinued, &c. and this releaſe ſhall enure to him in the remainder, to have advantage of it, aſwell as to the tenant for terme of life (1).

LITTLETON having before ſpoken of releaſes which enure by way of enlargement, by way of *mitter l'eſtate*, and by way of *mitter le droit*, here ſpeaketh of a releaſe of a right which in ſome reſpects enureth by way of extinguiſhment; as in this caſe which *Littleton* here putteth, the releaſe to the leſſee of the leſſee doth not enure by way of *mitter le droit*, for then ſhould he have the whole right, but as it were by way of extinguiſhment, in reſpect of him that made the releaſe, and that it ſhall enure to him in the remainder, which is a qualitie of an inheritance extinguiſhed. But yet the right is not extinct in deed, as ſhall be ſaid hereafter in this chapter. (Poſt. 279.) [275. b.]

"*Mon reverſion fuit diſcontinue, &c.*" Here diſcontinue is in a large ſenſe taken for deveſted, though the entrie of the leſſor be not taken away, which is implyed in this (*&c.*). (Poſt. 327, b.)

Sect. 471.

CAR a cel intent le tenant a terme de vie et celuy en le remainder ſont ſicome un tenant en ley, et ſont ſicome un tenant fuit ſole ſeiſie en ſon demeſne come de fee al temps de tiel releaſe fait a luy, &c.

FOR to this intent the tenant for terme of life and he in the remainder are as one tenant in law, and are as if one tenant were ſole ſeiſed in his demeſne as of fee at the time of ſuch releaſe made unto him, &c.

"*SONT come un tenant en ley.*" Which is certainly true in this caſe of remainder, and ſo it is alſo in caſe of a reverſion; as if a diſſeiſor make a leaſe for life, and the diſſeiſee doth releaſe all his right to the leſſee, this releaſe ſhall enure to him in the reverſion, albeit they have ſeverall eſtates, as hath beene ſaid, which is implyed in this (*&c.*).

But if a diſſeiſor make a leaſe for life, the remainder in fee, albeit they to ſome purpoſes (as here is ſaid) are as one tenant in law, yet if the diſſeiſee releaſe all actions to the tenant for life, after the death of the tenant for life, he in the remainder ſhall not take benefit of this releaſe, for it extended only to the tenant for life, as it is holden [a] in *Edward Altham's* caſe. And in like manner, [a] Lib. 8. fol. 148. Edw. Altham's caſe. (Poſt. Sect. 494.)

‖ *&c.* not in L. and M. and Roh.

(1) [See Note 239.]

manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this inureth not to him in the reversion; and so our author is to be understood of a release of rights, and not of a release of actions, to the tenant for life, as to or for the benefit of him in the remainder or reversion.

Sect. 472.

*ITEM, si home soit dissiste per deux, s'il relessa a un d'eux, il tiendra son compaignion hors de terre, et per tiel release il avera le sole possession et estate en la terre. Mes si un disseisor enfeoffa deux en fee, et le disseisee relessa a l'un des feoffees, ceo urera a ambideux de les feoffees, et la cause de diversity entre ceux deux cases est assets preignant. * Par ceo que ils veignont eins per feoffment, et l'autres per tort, &c.*

ALSO, if a man be disseised by two, if he release to one of them (1), hee shall hold his companion out of the land, and by such release hee shall have the sole possession and estate in the land. But if a disseisor infeoffe two in fee, and the disseisee release to one of the feoffees, this shal inure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough. For that they come in by feoffment, and the others by wrong, &c.

21 H. 6. 41. (Ant. 194. a. b.)

"*SI home soit disseisie, &c.*" This is to bee understood where tenant in fee simple is disseised and releasé; for if tenant for life be disseised by two, and he releaseth to one of them, this shall inure to them both; for he to whom the release is made, hath a longer estate than hee that releaseth, and therefore cannot inure to him alone, to hold out his companion, for then should the releasé inure by way of entrie and grant of his estate; and consequently the disseisor, to whom the releasé is made, should become tenant for life, and the reversion revested in the lessor [b], which strange transmutation and change of estates in this case the law will not suffer. But if lessee for yeares be ousted, and he in the reversion disseised, and the lessee releasé to the disseisor, the disseisee may enter, for the terme of yeares is extinct and determined. But otherwise it is in case of a lessee for life, for the disseisor hath a freehold, whereupon the releasé of tenant for life may enure; but the disseisor hath no terme for yeares, whereupon the releasé of the lessee for yeares may enure.

[b] 13 E. 4. tit. Discent, F. 29.

[276. a.]

(Ant. 265. b. Ant. 289. a.)

And so it is if donée in taile be disseised by two, and releaseth to one of them, it shall enure to them both. But if the king's tenant for life be disseised by two, and he releaseth to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. So if two joyntenants make a lease for life, and after doe disseise the tenant for life, and he releasé to one of them, he shall hold out his companion, for the disseisin was but of an estate for life.

If

* The remainder of this Section not in L. and M. nor Roh.

(1) [See Note 240.]

If tenant for life be diſſeiſed by two, and he in the reverſion and tenant for life joyne in a releaſe to one of the diſſeiſors, he ſhall hold his companion out, and yet it cannot enure by way of entrie and feoffment. But if they ſeverally releaſe their ſeverall rights, their ſeverall releaſes ſhall enure to both the diſſeiſors.

But here in *Littleton*'s caſe, where tenant in fee ſimple is diſſeiſed by two, and releaſeth to one of them, this for many purpoſes enureth by way of entrie and feoffment, and therefore he to whom the releaſe is made ſhall hold out his companion, and be made ſole tenant of the fee ſimple. And this holdeth not only in caſe of a diſſeiſin, but alſo in caſe of intruſion and abatement: but neceſſarily he to whom the releaſe is made muſt bee in by wrong, and not by title.

If two men doe gaine an advowſon by uſurpation, and the right patron releaſeth to one of them, he ſhall not hold out his companion, but it ſhall enure to them both; for ſeeing their clerke came in by admiſſion and inſtitution, which are judiciall acts, they are not meerely in by wrong: for an uſurpation ſhall cauſe a remitter, as it appeareth in *F. N. B.* 31. *m.*

But if a leaſe for life be made, the remainder for life, the remainder in fee, and he in remainder for life diſſeiſeth the tenant for life, and then tenant for life dieth, the diſſeiſin is purged, and he in the remainder for life hath but an eſtate for life. And ſo note a diverſitie where the particular eſtate for life is precedent, and when ſubſequent. 19 H. 6. 24. 38 H. 6. 28. Caſe de occupant. (Ant. 49. b.)

Where our author putteth his caſe of one diſſeiſed, put the caſe that two joyntenants in fee be diſſeiſed by two, and one of the diſſeiſees releaſe to one of the diſſeiſors all his right, he ſhall not hold out his companion, becauſe the releaſe is but of the moytie, without any certaintie. If a man be diſſeiſed by two women, and one of them take huſband, and the diſſeiſee releaſe to the huſband, this ſhall enure to the advantage of both the diſſeiſors, becauſe the huſband was no wrong doer, but in a manner in by title. (Fol. 278. a.)

"*Il avera le ſole poſſeſſion et eſtate.*" If two diſſeiſors be, and they make a leaſe for life, and the diſſeiſee releaſe to one of them, this ſhall enure to them both, and to the benefit of the leſſee for life alſo: for he cannot by the releaſe have the ſole poſſeſſion and eſtate, for part of the eſtate is in another.

And ſo it is (as it ſeemeth) if the diſſeiſors make a leaſe for yeares, and the diſſeiſee releaſe to one of them, this ſhall enure to them both, for by the releaſe he cannot have the ſole poſſeſſion: and it appeareth by *Littleton*, that he muſt have the ſole poſſeſſion, and hold his companion out. But the morgagee upon condition, having broken the condition, is diſſeiſed by two, the morgagor having title of entrie for the condition broken, releaſe to the one diſſeiſor, albeit they be in by wrong, yet the releaſe ſhall enure to them both for two cauſes: firſt, for that they are not wrong doers to the morgagor, but to the morgagee; and by *Littleton*'s caſe it appeareth, that wrong is done to him that made the releaſe: ſecondly, that hee that makes the releaſe hath but a title by force of a condition, and *Littleton*'s caſe is of a right. Like law of an entrie for mortmaine, or a conſent to raviſhment, &c.

"*Mes ſi un diſſeiſor infeoffa deux, &c.*" And the reaſon of this diverſitie is, for that the feoffees are in by title, and are preſumed to 21 H. 6. 41. (Ant. 194. b. 5 Rep. 70.)

to have a warrantie, which is much favoured in law, and the diſſeiſors are meerely in by wrong. And the equitie of the law doth preſerve in this caſe the benefit of the eſtranger to the releaſe comming in by one joynt title.

" *Pur ceo que ils voignont cins per feoffment, et l'auters per tort.*" This is of a new addition, and not in the originall, and therefore I paſſe it over.

Sect. 473. [276. b.]

*ITEM, ſi jeo ſue diſſeiſie, et mon diſſeiſor eſt diſſeiſie, ſi jeo releaſe a le diſſeiſor de mon diſſeiſor, jeo n'avera a unque aſſiſe ne entra ſur * le diſſeiſor, pur ceo que ſon diſſeiſor ad mon droit per mon releaſe, &c. † Et iſſint il ſemble en tiel cas, ſi ſoyent xx. diſſeiſors, ckeſcun apres auter, et jeo releſſa a le darreine diſſeiſor, ‡ celuy diſſeiſor barrera touts les auters de lour actions et lour titles. Et la cauſe eſt, § come il ſemble, pur ceo que en mults caſes, quant un home ad loyal title d'entre, ‖ coment que il n'entra pas, il defeatera touts meane titles per ſon releaſe, &c. Mes ceo n'eſt ¶ my en cheſcun caſe, come ſerra dit apres.*

ALSO, if I bee diſſeiſed, and my diſſeiſor is diſſeiſed, if I releaſe to the diſſeiſor of my diſſeiſor, I ſhall not have an aſſiſe nor enter upon the diſſeiſor, becauſe his diſſeiſor hath my right by my releaſe, &c. And ſo it ſeemeth in this caſe, if there be xx. diſſeiſed one after another, and I releaſe to the laſt diſſeiſor, this diſſeiſor ſhall barre all the others of their actions and their titles. And the cauſe is, as it ſeemeth, for that in many caſes, when a man hath lawfull title of entrie, although he doth not enter, hee ſhall defeat all meane titles by his releaſe, &c. But this holds not in everie caſe, as ſhall be ſaid hereafter (1).

HERE it is to be obſerved, that a releaſe by one whoſe entry is lawfull to him that is in by wrong, ſhall purge and take away all meane eſtates and titles. And where our author firſt putteth his caſe of two eſtates by wrong, and after of twentie diſſeiſins, all eſtates be wrong.

(Poſt. 277. b. 278. a.) 21 H. 6. 41. 11 H. 4. 33. 9 H. 7. 25. 2 E. 4. 16. 21 E. 4. 78. 12 Aſſ. 22. Vide 3 H. 6. 38.

If *A.* diſſeiſe *B.* who enfeoffeth *C.* with warrantie, who enfeoffeth *D.* with warrantie, and *E.* diſſeiſeth *D.* to whom *B.* the firſt diſſeiſee releaſeth, this doth defeat all the meane eſtates and warranties, becauſe the releaſe of *B.* is made to a diſſeiſor, and his entrie is lawfull.

* *le—ſon*, L. and M. and Roh.
† *et* not in L. and M. nor Roh.
‡ *celuy diſſeiſor—il*, L. and M. and Roh.
§ *come il ſemble* not in L. and M. nor Roh.
‖ *coment que il n'entra pas—et entre*, L. and M. and Roh.
¶ *my—pas*, L. and M. and Roh.

(1) [See Note 241.]

Sect.

Sect. 474.

*ITEM, ſi mon diſſeiſor leſſa les tenements dont il moy diſſeiſiſt a un * auter home pur terme de vie, et puis le tenant a terme de vie aliena en fee, et jeo releſſa al alienee, &c. donque mon diſſeiſor ne poit enter*, cauſâ quâ ſupra, *coment que a un foits l'alienation fuit a ſon diſenheritance, &c.*

ALSO, if my diſſeiſor letteth the tenements whereof he diſſeiſed mee to another for terme of life, and after the tenant for terme of life alieneth in fee, and I releaſe to the alienee, &c. then my diſſeiſor cannot enter *cauſâ quâ ſupra*, albeit that at one time the alienation was to his diſinheritance, &c.

"*ITEM, ſi mon diſſeiſor leſſa, &c.*" If the diſſeiſor make a leaſe for life, and the leſſee maketh a feoffment in fee, and the diſſeiſee releaſeth to the feoffee, the diſſeiſor ſhall not enter upon the feoffee; for albeit the releaſe to one joynt feoffee of a diſſeiſor, as hath beene ſaid, ſhall not exclude the other, yet a releaſe to the feoffee of a tenant for life in this caſe ſhall take away the entrie of
[277. a.] the diſſeiſor for the alienation which was made to his diſinheritance, hee having the inheritance by diſſeiſin, ſo as hee could have no warranty annexed to it, and tenant for life hath forfeited his eſtate. But if the entrie of the diſſeiſee were not lawfull, it is otherwiſe. As if a man make a leaſe for life, and the leſſee for life is diſſeiſed, and that diſſeiſor is diſſeiſed, and he in the reverſion releaſeth to the ſecond diſſeiſor, the firſt diſſeiſor ſhall enter upon the ſecond diſſeiſor, and his entry is lawfull; and if the leſſee for life reenter, he ſhall leave the reverſion in the firſt diſſeiſor; and the cauſe is, for that the entry of the diſſeiſor at the time of the releaſe made was not lawfull. And the booke of [*m*] 9 *H.* 7. 25. is to be intended of an eſtate taile *mutatis mutandis*.

(8 Rep. 148. Sect. 447. 6 Rep. 70. Hob. 279.)

[*m*] 9 H. 7. 25.

If, in the caſe aforeſaid, the diſſeiſor make a leaſe for life, and the leſſee infeoffeth two, and the diſſeiſee releaſe to one of the feoffees, this ſhall barre the diſſeiſor, as hath beene ſaid; but yet he ſhall not hold out his companion for the cauſe aforeſaid.

Sect. 475.

ITEM, ſi home ſoit diſſeiſie, lequel ad fits deins age et moruſt, et eſteant le fits deins age le diſſeiſor moruſt ſeiſi, et la terre diſcendiſt a ſon heire, et un eſtrange abate, et puis le fits le diſſeiſee, quant il vient a ſon plein age, releſſa tout ſon droit a l'abator; en ceſt caſe l'heire le diſſeiſor n'avera

ALSO, if a man be diſſeiſed, who hath a ſonne within age and dieth, and the ſonne being within age the diſſeiſor dieth ſeiſed, and the land deſcend to his heire (1), and a ſtranger abate, and after the ſonne of the diſſeiſee, when hee commeth to his full age, releaſeth all his right

* *auter* not in L. and M. nor Roh.

(1) [See Note 242.]

*n'avera assise de mor-d'ancestor envers l'abator, mes gerra bar, * pur ceo que l'abator ad le droit del fits le disseisee per jour reddos, et l'entry le fits fuit congeable, † pur ceo que il fuit deins age al temps del assent, &c.*

right to the abator; in this case the heire of the disseisor shall not have an assise of mor-d'ancestor against the abator; but shall bee barred, because the abator hath the right of the sonne of the disseisee by his remedie, and the entry of the sonne was congeable, for that hee was within age at the time of the discent, &c.

THE reason of this case is, for that the entry of the heire is congeable, and the abator is in the land by wrong.

Vet. N. B. 115. Britton, cap. 51. Bract. li. 4. cap. 2. F. N. B. 203 t. W. 1. ca. 27.

"*Abate*," is both an English and French word, and signifieth in his proper sense to diminish or take away, as here by his entrie he diminisheth and taketh away, the freehold in law descended to the heire; and so it is said to abate an account, signifying subtraction or withdrawing, &c. and to abate the courage of a man. In another sense it signifyeth to prostrate, beat downe, or overthrow, as to abate castles, houses, and the like, and to abate a writ; and hereof commeth a word of art, *abatamentum*, which is an entrie by interposition. Now the difference *inter disseisinam, abatamentum, intrusionem, deforciamentum, et usurpationem, et purpresturam*, is this:

A disseisin is a wrongfull putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of an inheritance, and betweene the death and the entry of the heire, an estranger doth interpose himselfe, and abate.

[n] F.N.B. 203. Fleta li. 4. cap. 30.

Intrusion first properly [n] is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and tenant for life dieth, and betweene the death and the entry of the heire an estranger doth interpose himselfe and intrude.

[o] Pl. Com. title de mynes.

Secondly, [o] he that entreth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

[p] F.N.B. 141. f. g. h.

Thirdly, [p] when the heire in ward entreth at his full age without satisfaction for his mariage, the writ saith, [277. b.] *quod intrusit.*

Deforciamentum comprehendeth not only these aforenamed, but any man that holdeth land whereunto another man hath right, be it by discent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law; one, when an estranger that no right hath presenteth to a church, and his clerke is admitted and instituted, hee is said to bee an usurper, and the wrongfull act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawfull warrant, royal franchises, he is said to usurpe upon the king those franchises.

[q] Glanvil. lib. 9. cap. 11. Britton fol. 28, 29. (Cro. Car. 17. 2 Inst. 278.)

Purpresture, or *pourpresture*, a purpresture. [q] *Purpresture est, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common

* *d'assise* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

common ſtreet or publike water, or ſuch like publike things, it is derived of the French word *pourpris*, which ſignifieth an incloſure, but ſpecially applied, as is aforeſaid, by the common law.

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*MES ſi * home ſoit diſſeiſie, et le diſſeiſor fait feoffment ſur condition, ceſtaſcavoir, de rendre a luy certaine rent, et pur default de payment un re-entre, &c. ſi le diſſeiſee releſſa al feoffee ſur condition, uncore ceo † n'ameudra l'eſtate le feoffee ſur condition; car nient obſtant tiel releas, uncore ſon eſtate eſt ſur condition, ſicome il fuit devant.*

‡ Et cum hoc concordat opinio omnium juſticiarorum, P. 9 H. 7.

BUT if a man be diſſeiſed, and the diſſeiſor maketh a feoffement upon condition, *viz.* to render to him a certaine rent, and for default of payment a re-entry, &c. if the diſſeiſee releaſe to the feoffee upon condition, yet this ſhall not amend the eſtate of the feoffee upon condition; for notwithſtanding ſuch releaſe, yet his eſtate is upon condition, as it was before (1).

And with this agreeth the opinion of all the juſtices, *Paſch.* 9 *H.* 7.

HERE the entry of the diſſeiſee is congeable, and yet the releaſe doth not avoid the condition, becauſe the feoffee is in by title, as hath beene ſaid, and may have a warranty (2). And herein our author expreſſeth a diverſitie betweene a condition in law, and a condition in deed; for in the caſe before when the diſſeiſee releaſeth to the feoffee of the tenant for life, the condition in law is taken away, but otherwiſe it is in this caſe of a condition in deed. 9 H. 7. 25.

But if the feoffee upon condition make a feoffment in fee over without any condition, and the diſſeiſee releaſe to the ſecond feoffee, the condition is deſtroyed by the releaſe before the condition broken or after. For the ſtate of the ſecond feoffee was not upon any expreſſe condition, as *Littleton* here putteth his caſe, and he may have advantage of the releaſe, becauſe it is not againſt his owne proper acceptance, as *Littleton* ſpeaketh in the next Section. (Sect. 415.) Lib. 1. f. 147. Mayowe's caſe.

But if it be a wrongfull title, ſuch a title is taken away by a releaſe; as if *A.* diſſeiſed *B.* to the uſe of *C. B.* releaſe to *A.* this ſhall take away the agreement of *C.* to the diſſeiſin, becauſe it ſhould make him a wrong doer: as if the diſſeiſor be diſſeiſed, the diſſeiſee releaſeth to the ſecond diſſeiſee, this taketh away the right the firſt diſſeiſor had againſt the ſecond, and a relation of an eſtate gained by wrong ſhall never defeat an eſtate ſubſequent gained by right, againſt a ſingle opinion, not affirmed by any other in one of our bookes. 14 H. 8. 18. per Port. (Ant. 271. a. 276. b.)

* *actum* added in L. and M. and Roh. Vell. MS.

† *n'amendra—ne abatera*, L. and M. and Roh. *ne alteraſt*, Pap. MS. *n'avoidera*, Roh.

‡ This paragraph not in L. and M. nor Roh.

(1) [See Note 243.] (2) [See Note 244.]

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ET meſme le manner eſt lou home ſoit diſſeiſie de certeine terre, et le diſſeiſor grant un rent-charge hors de meſme la terre, &c. coment que apres le diſſeiſee releſſa al diſſeiſor, &c. uncore le rent-charge demurt en ſa force. Et la cauſe en ceux deux caſes eſt ceo, que home n'avera advantage per tiel releas que ſerra encounter ſon proper acceptance, et encounter ſon grant demeſne. Et coment que aſcuns ont dit, que lou l'entre de home eſt congeable ſur un tenant, s'il releaſſt a meſme le tenant, que ceo availeroit a le tenant, ſicome il ujt enter ſur le tenant, et puis luy enfeoffa, &c. ceo n'eſt pas voier en cheſcun cas. Car en le primer cas de ceux deux avantdits caſes, ſi le diſſeiſee ujt enter ſur le feoffee ſur condition, et puis luy enfeoffa, donques eſt le condition tout defeat et avoid. Et iſſint en le ſecond caſe, ſi le diſſeiſee entraſt et enfeoffa celuy que grant a le rent-charge, donques eſt le rent-charge anient et avoid, mes il n'eſt pas void per aſcun tiel releas ſans entry fait, &c.

IN the ſame manner it is where a man is diſſeiſed of certaine lands, and the diſſeiſor grant a rent-charge out of the ſame land, &c. albeit the diſſeiſee doth afterwards releaſe to the diſſeiſor, &c. yet the rent-charge remaynes in force. And the reaſon in theſe two caſes is this, that a man ſhall not have advantage by ſuch releaſe which ſhall bee againſt his proper acceptance, and againſt his own grant. And albeit ſome have ſaid, that where the entry of a man is congeable upon a tenant, if hee releaſes to the ſame tenant, that this ſhall availe the tenant, as if he had entered upon the tenant, and after enfeoffed him, &c. this is not true in every caſe. For in the firſt caſe of theſe two caſes aforeſaid, if the diſſeiſee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And ſo in the ſecond caſe, if the diſſeiſee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any ſuch releaſe without entrie made, &c.

"*ET le diſſeiſor grant un rent-charge, &c.*" Here is implyed commons or any other profit out of the lands. And the reaſon is, becauſe he ſhall not avoid his owne grant by a releaſe hee himſelfe hath acquired ſince the grant: but if the diſſeiſor in that caſe be diſſeiſed, and the diſſeiſee releaſe to the ſecond diſſeiſor, he ſhall avoid it, as by that which hath beene ſaid, *Sect.* 473, appeareth. So likewiſe if *A.* and *B.* bee joynt diſſeiſors, and *B.* grant a rent-charge, and the diſſeiſee releaſe to *A.* all his right, *A.* ſhall avoid the rent-charge, becauſe it was not granted by him, and ſo not within the reaſon of our author. (6 Rep. 78. b.) [278. a.] (7 Rep. 33.) (Poſt. 349. a.) (Mo. 93.)

If there bee two femes joint diſſeiſors, and the one taketh huſband, and the diſſeiſee releaſe to the other, ſhee is ſole ſeiſed, and ſhal hold out the huſband and wife. (Ant. 276. a.)

If two diſſeiſors bee, and they infeoffe another, and take backe an eſtate for life or in fee, albeit they remaine diſſeiſors to the diſſeiſee as to have an aſſiſe againſt them, yet if he releaſe to one of them, he ſhall not hold out his companion, becauſe their ſtate in the land is by feoffment.

If

If there be two diſſeiſors, and they be diſſeiſed, and they releaſe to their diſſeiſor, and after diſſeiſe him, and then the diſſeiſee releaſe to one or both of them, yet the ſecond diſſeiſor ſhall reenter, for they ſhall not hold the land againſt their owne releaſe; for *Littleton* here ſaith, that they ſhall not avoid their owne grant, and by like reaſon they ſhall not avoid their owne releaſe, *et ſic de ſimilibus.*

"*Come s'il uſt enter ſur le tenant et luy enfeoffe.*" Here is another kinde of releaſe, *viz.* a releaſe which enureth by way of entry and feoffment; for if a diſſeiſee releaſe to one of the diſſeiſors to ſome purpoſe, this ſhall enure by way of entry and feoffment, *viz.* as to hold out his companion. But as to a rent-charge granted by him, it ſhall not enure by way of entrie and feoffment; for if the diſſeiſee had entred and enfeoffed him, the rent-charge had beene avoided. But it is a certaine rule, that when the entry of a man is congeable, and he releaſeth to one that is in by title, (as hereto the feoffee upon condition is) it ſhall never enure by way of entry and feoffment, either to avoid a condition with which he accepted the land charged, or his owne grant, or to hold out his companion. (Ant. 194.) [278. b.]

And where it appeareth by our author, that acts done by the diſſeiſor ſhall not be avoided by the releaſe of the diſſeiſee, it is to be noted, that acts made to the diſſeiſor himſelfe ſhall not be avoyded by the alteration of his eſtate by the releaſe of the diſſeiſee; as if the lord before the releaſe had confirmed the eſtate of the diſſeiſor to hold by leſſer ſervices, the diſſeiſor ſhall take advantage of it, and ſo of eſtovers to be burnt in the houſe, and the like law of a warrantie made unto him. (Dr. and Stud. 50. a.)

If the heire of the diſſeiſor indow his wife *ex aſſenſu patris*, and the diſſeiſee releaſe to the diſſeiſor; he ſhall not avoide the indowment, for that is like the caſe put by *Littleton* of the rent-charge.

If an alien be a diſſeiſor, and obtaine letters of denization, and then the diſſeiſee releaſe unto him, the king ſhall not have the land, for the releaſe hath altered the eſtate, and it is as it were a new purchaſe; otherwiſe it is if the alien had beene the feoffee of a diſſeiſor.

If the lord diſſeiſe the tenant, and is diſſeiſed, the diſſeiſee releaſe to the ſecond diſſeiſor, yet the ſeigniorie is not revived, for betweene the parties the releaſe enures by way of entrie and feoffment as to the land; but not having regard to the ſeigniorie, and for that the poſſeſſion was never actually removed or reveſted from the diſſeiſor, who claimeth under the lord, the ſeigniorie is not revived. But if the lord and a ſtranger diſſeiſe the tenant, and the diſſeiſee releaſe to the ſtranger, there the ſeigniorie by operation of law is revived, for the whole is veſted in the ſtranger which never claimed under the lord: and in that caſe, if the lord had died, and the land had ſurvived, the ſeigniorie had beene revived. But if the lord had diſſeiſed the tenant, and beene diſſeiſed by two, and the diſſeiſee releaſed to one of them, the ſeigniorie is not revived, becauſe he claimed (as hath beene ſaid) under the lord.

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*ITEM, ſi home ſoit diſſeiſie per un enfant * lequel aliena en fee, et alienee devie ſeiſie, et ſon heire enter, eſteant † le diſſeiſor deins age, ore eſt en election ‡ le diſſeiſour d'aver un brieſe ‖ de* dum fuit infra ætatem, *ou brieſe de droit envers le heire del alienee, et quel brieſe de eux que il eſtiera, il doit recover per la ley, § &c. Et auxi il poit enter en la terre ſans aſcun recoverie, et en ceſt caſe l'entre le diſſeiſie eſt tolle, &c. Mes en ceſt cas ſi le diſſeiſie releſſa ſon droit al heire del alienee, et puis le diſſeiſor porta brieſe de droit envers l'heire d'alienee, et il joyne le miſe ſur le mere droit, &c. le graunde aſſiſe doit trouver per la ley, que le tenant ad pluis mere droit ⊥ que ad le diſſeiſor, ¶ &c. pur ceo que le tenant ad le droit le diſſeiſie per ſon releaſe, lequel eſt pluis ancient et pluis mere droit: car per tiel leas tout le droit le diſſeiſee paſſa a le tenant, et eſt en le tenant. Et a ceo que aſcuns ont dit, que en tiel caſe lou home que ad droit al terres ou tenements (mes ſon entrie n'eſt pas congeable) s'il releſſa al tenant ** tout ſon droit, &c. que tiel releaſe urera per voy d'extinguiſhment. Quant a ceo il puit eſtre dit, que ceo eſt †† voyer quant a celuy que releſſa; car per ſon releaſe il ad luy demiſe ‡‡ quietment de ⊥⊥ ſon droit, quant a ſon perſon, mes uncore ‖‖ le droit que il avoit bien poit paſſer a le tenant per ſon releaſe. Car enconvenient ſerroit que tiel ancient droit ſerroit extinct tout ouſterment, &c.*

ALSO, if a man bee diſſeiſed by an infant who alien in fee, and the alienee dieth ſeiſed, and his heire entreth, the diſſeiſor being within age, now is it in the election of the diſſeiſor to have a writ of *dum fuit infra ætatem*, or a writ of right againſt the heire of the alienee, and which writ of them hee ſhall chuſe, hee ought to recover by the law, &c. And alſo he may enter into the land without any recovery, and in this caſe the entrie of the diſſeiſee is taken away, &c. But in this caſe if the diſſeiſee releaſe his right to the heire of the alienee, and after the diſſeiſor bringeth a writ of right againſt the heire of the alienee, and hee joyne the miſe upon the meere right, &c. the great aſſiſe ought to finde by the law, that the tenant hath more meere right than the diſſeiſor, &c. for that the tenant hath the right of the diſſeiſee by his releaſe, the which is the moſt ancient and moſt meere right: for by ſuch releaſe all the right of the diſſeiſee paſſeth to the tenant, and is in the tenant. And to this ſome have ſaid, that in this caſe where a man which hath right to lands or tenements (but his entrie is not congeable) if he releaſe to the tenant all his right, &c. that ſuch releaſe ſhal enure by way of extinguiſhment. As to this it may bee ſaid, that this is true as to him which releaſeth; for by his releaſe hee hath diſmiſſed himſelfe equite

* *Deins age* added in L. and M. and Roh.

† *le diſſeiſor—l'alienour* in L. and M. and Roh.

‡ *le diſſeiſor—d'alienour* L. and M. and Roh.

‖ *de* not in L. and M. nor Roh.

§ *&c.* not in L. and M. nor Roh.

⊥ *&c.* added L. and M. and Roh.

¶ *&c.* not in L. and M. nor Roh.

** *&c.* added L. and M. and Roh.

†† *voyer—verite*, L. and M. and Roh.

‡‡ *quietment* not in L. and M. nor Roh. —*nettement*, MSS.

⊥⊥ *tout* added L. and M. and Roh.

‖‖ *le droit que il avoit bien poet paſſer a le tenant per ſon releaſe*, not in the Vell. MS. but omitted moſt probably through miſtake.

&c. car il eſt communement dit, que droit ne poit pas morier.

quite of his right as to his perſon, but yet the right which hee hath may well paſſe to the tenant by his releaſe. For it ſhould bee inconvenient that ſuch an ancient right ſhould bee extinct altogether, &c. for it is commonly ſaid, that a right cannot die.

"*QUEL briefe de eux il eſlicra, &c.*" Note, many times in one caſe the law doth give a man ſeverall remedies, and of ſeverall kindes, as in this caſe by action and by entry; by action, either a writ of right, or *dum fuit infra ætatem.* (Ant. 45. a.) Vid. Sect. 514. 28 E. 3. 98. 9 E. 4. 46. 21 E. 4. 55. 41 E. 3. 10.

"*Et puis le diſſeiſor porta briefe de droit, &c.*" Here it appeareth that there is a great art and knowledge for a man that hath divers remedies to chuſe his apteſt remedie; as in this caſe, if he bring his writ of right, the diſſeiſor ſhall be barred, but if he had entred upon the heire of the alienee, he ſhould have enjoyed the land for ever. For in that caſe the heire of the alienee after ſuch an entrie ſhall never have a writ of right, no more then if the diſſeiſee entreth upon the heire of the diſſeiſor; and make a feoffment in fee, if the heire of the diſſeiſor re-enter he ſhall [279. a.] detaine the land for ever, and the feoffee ſhall not maintaine any writ of right; for a bare right ſhall never be left in the feoffee, but ſhall ever follow the poſſeſſion, as hath beene ſaid: but if the diſſeiſee entreth upon the heire of the diſſeiſor, and make a feoffment in fee upon condition, and entreth for the condition broken before the heire of the diſſeiſor enter, hee is reſtored to his right againe. 24 H. 8. Reſtore al primer action, 5. Vide Sect. 447.

A man maketh a gift in taile, the remainder in fee, tenant in taile dieth without iſſue, an eſtranger intrude, and he in the remainder bringe a formedon, and recovereth by default, and maketh a feoffment in fee, the intrudor reverſe the recoverie in a writ of diſceit and entreth, he ſhall detaine the land for ever, and the feoffee ſhall not have a writ of right. 9 H. 7. 24.

And ſo likewiſe if a diſſeiſor die ſeiſed, and a ſtranger abate, and the diſſeiſee releaſe to him, the heire of the diſſeiſor ſhall enter and detaine the land for ever. For the right to the poſſeſſion ſhall draw the right of the land to it, and ſhall not leave a right in him to whom the releaſe is made, as hath been ſaid before in the 447 Section. 9 H. 7. 24.

"*Le droit del diſſeiſee paſſa al tenant, et eſt en le tenant.*" For ſeeing the tenant hath the whole fee ſimple, he is capable of the whole right of the diſſeiſee, and, as *Littleton* here ſaith, the right is in the tenant.

"*Inconvenient ſerroit.*" Here againe, as hath beene often obſerved, an argument *ab inconvenienti* is forcible in law; and that judges by the authoritie of our author are to judge of inconve- [279. b.] niences as of things unlawfull, as hereby and by many other places it appeareth. Vide Sect. 87. 138, 139. 231. 269. 440. 722.

"*Un droit ne poit pas morier.*" *Dormit aliquando jus, moritur nunquam.* For of ſuch an high eſtimation is right in the eye of the law, as the law preſerveth it from death and deſtruction: trodden downe it may bee, but never trodden out. For where it hath beene

beene ſaid, that a releaſe of right doth in ſome caſes enure by way of extinguiſhment; it is ſo to be underſtood, either (as *Littleton* doth here) in reſpect of him that makes the releaſe, or in reſpect that by conſtruction of law it enureth not alone to him to whom it is made, but to others alſo who be eſtrangers to the releaſe, which, as hath beene ſaid, is a qualitie of an inheritance extinguiſhed.

14 H. 8. 6. b. As if there be lord and tenant, and the tenant maketh a leaſe for life, the remainder in fee, if the lord releaſe to the tenant for life, the rent is wholly extinguiſhed, and he in the remainder ſhall take benefit thereof; even ſo when the heire of a diſſeiſor is diſſeiſed, and the diſſeiſor make a leaſe for life, the remainder in fee, if the firſt diſſeiſee releaſe to the tenant for life, this is ſaid to enure by way of extinguiſhment, for that it ſhall enure to him in the remainder, who is a ſtranger to the releaſe; and yet in truth the right is not extinct, but doth follow the poſſeſſion, *viz.* the tenant for life hath it during his time, and he in the remainder to him and to his heires, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore if, after the death of tenant for life, the heire of the diſſeiſor bring a writ of right againſt him in the remainder, and he joyne the miſe upon the meere right, it ſhall be found for him, becauſe in judgment of law he hath by the ſaid releaſe the right of the firſt diſſeiſee.

Sect. 479.

*MES releaſes que enurera per voy d'extinguiſhment envers touts perſons, ſont lou celuy a que le releas eſt fait, ne poit aver ceo que a luy eſt releas. Sicome ſi ſoyent ſeignior et tenant, et le ſeignior releſſa al tenant tout le droit que il ad en la ſeigniory, ou tout le droit que il ad en le terre, &c. tiel releas va per voy de extinguiſhment envers touts perſons, pur ceo que le tenant ne poit aver *ſervice pur prender de luy meſme.*

BUT releaſes which enure by way of extinguiſhment (1) againſt all perſons, are where hee to whom the releaſe is made cannot have that which to him is releaſed. As if there bee lord and tenant, and the lord releaſe to the tenant all the right which hee hath in the ſeigniory, or all the right which he hath in the land, &c. this releaſe goeth by way of extinguiſhment againſt all perſons, becauſe that the tenant cannot have ſervice to receive of himſelfe.

14 H. 8. fol. 5, 6. 11 H. 7. 25. 30 H. 6. tit. barre. 39. 38 E. 3. 10.

HERE *Littleton* putteth a diverſity betweene releaſes which enure by way of extinguiſhment againſt all perſons, and whereof all perſons may take advantage, and releaſes which in reſpect of ſome perſons enure by way of extinguiſhment, and of other perſons by way of *mitter le droit*: or betweene releaſes which in deed enure by extinguiſhment, for that hee to whom the releaſe is made cannot have the thing releaſed, and releaſes which, having ſome quality of ſuch releaſes, are ſaid to enure by way of extinguiſhment, but in troth doe not, for that he to whom the releaſe is made may

* *ſervice pour prender—ceo*, L. and M. and Roh.

(1) Here Littleton returns to releaſes by extinguiſhment. See ant. 268.

may receive and take the thing releaſed. And here *Littleton* putteth caſes where releaſes do abſolutely enure by extinguiſhment without exception, having reſpect to all perſons. And firſt of the lord and tenant: ſecondly, of the rent-charge: thirdly, of the common of paſture.

Sect. 480.

*EN meſme la maner eſt de releas fait al tenant del terre de un rent-charge ou common de paſture, &c. pur ceo que le tenant ne poit aver ceo que a luy eſt releſſe, &c. iſſint tiels releaſes urera * per extinguiſhment en touts voyes.*

IN the ſame manner is it of a releaſe made to the tenant of the land of a rent-charge or common of paſture, &c. becauſe the tenant cannot have that which to him is releaſed, &c. ſo ſuch releaſes ſhall enure by way of extinguiſhment in all wayes.

[280. a.] FIRST, of the lord and tenant, and the lord releaſe to the tenant his ſeigniorie, this muſt of neceſſity enure by way of extinguiſhment to all men; for the tenant cannot have ſervice to be taken of himſelfe, nor one man can be both lord and tenant. The ſecond is of a rent-charge; a man cannot have land and a rent iſſuing out of the ſame land. Thirdly, a man cannot have land and a common of paſture iſſuing out of the ſame land, *et ſic de cæteris*. For in all theſe caſes and the like he to whom the releaſe is made cannot have and enjoy the thing that is releaſed. But in the caſe of the right of the land, the tenant of the land may take and enjoy it for ſtrengthening his eſtate therein. (2 Roll. Abr. 405.)

The meſne being a feme enter marrie with the tenant peravaile, if the lord releaſe to the feme, the ſeigniorie only is extinct; but if hee releaſe to the huſband, both ſeigniorie and meſnaltie are extinct. And in this caſe, if the lord releaſe to the huſband and wife, it is a queſtion how the releaſe ſhall enure; but it is no queſtion but that a releaſe may be made to a meſnaltie or a ſeigniory ſuſpended in part of the eſtate. (Ant. 273. b.)

But here obſerve a diverſity where a releaſe enureth by way of extinguiſhment of an inheritance, which is in poſſeſſion and may be granted over, and a releaſe of a right, or an action to lands which cannot be granted over [r]. For the lord may releaſe his ſeigniorie to the tenant of the land for life or in taile, *et ſic de cæteris*. But ſo cannot one releaſe a right or an action; for if it be releaſed but for an houre, it is extinct for ever, as hath beene ſaid. (274. a. 1 Roll. Abr. 412.) (Ant. 214. a, 232. b. 266. a.) [r] 13 E. 3. tit. Extinguiſhment. Brooke 45, et tit. Voucher, F. 120. 30 E. 3. 13. 19 H. 6. 19, 21 E. 3. 33. 38 Aſſ. 17. 11 H. 4. tit. Releaſe, 21. 18 E. 2. ibid. 5. 26 H. 8. 5. 41 Aſſ. 6.

And two things are to be obſerved here. Firſt, that by the releaſe of all the right in the land the ſeigniorie is extinct, as well as by the releaſe of all the right in the ſeigniorie, for the ſeigniorie iſſueth out of the land. Secondly, that by the releaſe of all his right in the ſeigniorie or the land, the whole ſeigniorie is extinct without any words of inheritance. If the tenancie be given to a lord and to a ſtranger, and to the heires of the ſtranger, the lord releaſe to his companion all the right in the land, this releaſe doth not onely paſſe his eſtate in the tenancie, but extinguiſheth alſo his right in the

* *per extinguiſſment en touts voyes,*— *toutz perſons*, L. and M. and Roh. *toutz foitz per voie d'extinguiſſement envers*

the ſeigniorie, and ſo one releaſe enures to extinguiſh ſeverall rights in one and the ſame land.

If there be lord and tenant by fealty and rent, the lord granteth the ſeigniorie for yeares, and the tenant attorneth, the lord releaſeth his ſeigniorie to the tenant for years, and to the tenant of the land generally, the whole ſeigniorie is extinct, and the ſtate of the leſſee alſo. But if the releaſe had beene to them and their heires, then the leſſee had had the inheritance of the one moietie, and the other moitie had beene extinct. And the reaſon of this diverſity is, becauſe when the releaſe is made generally, it can enure to the leſſee but for life, becauſe it enureth by way of enlargement of eſtate, and being made to the tenant of the land, it enureth by way of extinguiſhment, as *Littleton* here ſaith, and then there cannot remaine a particular eſtate in the ſeigniorie for life. But when the releaſe is made to them and their heires, each one takes a moitie, the one by way of encreaſing of the ſtate, and the other by extinguiſhment,

(Ant. 152. b.) (Mo. 59.)

Sect. 481.

*ITEM, de prover que le graund aſſiſe doit paſſer pur le demandant, en le caſe avantdit, jeo aye oye ſovent * la lecture de l'eſtatute de Weſtminſter ſecond, que commence,* In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ, &c. *que a le common ley devant † meſme l'eſtatute, ſi leaſe ſoit fait ‡ a un home pur terme de vie, le remainder ouſter en fee, et un eſtrange per feint action uſt recover envers le tenant a terme de vie per default, et puis ‡ le tenant moruſt, celuy en le remainder n'avoit aſcuns remedie devant le ſtatute, pur ceo que il n'avoit aſcun poſſeſſion del terre.*

ALSO, to prove that the graund aſſiſe ought to paſſe for the demandant, in the caſe aforeſaid, I have often heard the reading of the ſtatute of Weſt. 2. which begunne thus: *In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ, &c.* that at the common law before the ſayd ſtatute, if a leaſe were made to a man for terme of life, the remainder over in fee, and a ſtranger by feigned action recovered againſt the tenant for life by default, and after the tenant dieth, he in the remainder had no remedie before the ſtatute, becauſe hee had not any poſſeſſion of the land.

(2 Inſt. 345.) "*JEO aye oye ſovent la lecture de Weſt.* 2." Here it is to be obſerved, of what authoritie antient lectures or readings upon ſtatutes were, for that they had five excellent qualities. Firſt, they declared what the common law was before the making of the ſtatute, as here it appeareth. Secondly, they opened [280. b.] the true ſenſe and meaning of the ſtatute. Thirdly, their caſes were briefe, having at the moſt one poynt at the common law, and another upon the ſtatute. Fourthly, plaine and perſpicuous, for then the honour of the reader was to excell others in authorities, arguments, and reaſons for proofe of his opinion, and for confutation of the objections againſt it. Fifthly, they read, to ſuppreſſe ſubtill inventions to creepe out of the ſtatute. But now readings having loſt the ſaid former

* *en* added L. and M. and Roh.
† *meſme* not in L. and M. nor Roh.
‡ *a une home—ad tenant*, L. and M. and Roh.
‡ *le tenant* not in L. and M. nor Roh.

former qualities, have loſt alſo their former authorities: for now the caſes are long, obſcure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vaniſh away like ſmoke, and the readers are like to lapwings, who ſeeme to bee neereſt their neſts when they are fartheſt from them, and all their ſtudie is to find nice evaſions out of the ſtatute. By the authority of *Littleton*, ancient readings may be cited for proofe of the law; but new readings have not that honour, for that they are ſo obſcure and darke.

"*L'eſtatute de W.* 2." Which is the third chapter.

"*Le remainder ouſter en fee.*" Here is to be obſerved, that although the ſtatute ſpeaketh of a reverſion [*a*], yet by the authority of *Littleton* a remainder is within the ſtatute.

See the ſtatute of 14 *Eliz. cap.* 8. which provideth fully for him in the remainder.

[*a*] 24 E. 3. 35. 28 E. 3. 96. 18 E. 2. Entrie 74. 8 E. 2. Entrie 7. 6 E. 3. 24. 7 E. 3. Ent. 62. 7 E. 3. 54, 55. 15 E. 4. 15. F. N. B. 217. d. Regiſter 241.

"*Feint action.*" *Feint* is a participle of the French word *feindre*, which is to feigne or falſely pretend, ſo as a feint action is a falſe action.

"*N'avoit aſcun remedie devant l'eſtatute.*" [*b*] Here it appeareth by *Littleton*, that if a man maketh a leaſe for life, the remainder in fee, and tenant for life ſuffereth a recovery by default, that he in the remainder ſhould not have a formedon by the common law: for *Littleton* ſaith, that he hath not any remedy before the ſtatute. Neither is there any ſuch writ in that caſe in the Regiſter, albeit in ſome bookes mention is made of ſuch a writ.

[*b*] W. 2. cap. 5. Vide 34. E. 3. Formdon 31. 11 E. 3. ibid. 31. 8 E. 3. 59. F. N. B. 217. d. 7 H. 7. 13.

Sect. 482.

MES ſi celuy en le remainder uſt enter ſur le tenant a terme de vie et luy diſſeiſiſt, et apres le tenaunt entra ſur luy, et apres le tenant a terme de vie per tiel recovery perde per default et moriſt, ore celuy en le remainder bien poit aver briefe de droit envers celuy que recovera, pur ceo que le miſe ſerra joine ſolement ſur le mere droit, &c. Uncore en ceſt caſe, le ſeiſin de celuy en le remainder fuit defeat per entrie del tenant a terme de vie. Mes peradventure aſcuns voilent argue et dire, que il n'avera briefe de droit en ceſt caſe, pur ceo que quant le miſe eſt joine, il eſt joine en tiel manier, (ſcilicet) *ſi le tenant ad plus mere droit en le terre en le manner come il tyent, que le demandant ad en*

BUT if he in the remainder had entered upon the tenant for life, and diſſeiſed him, and after the tenant enter upon him, and after the tenaunt for life by ſuch recoverie loſe by default and die, now he in the remainder may well have a writ of right againſt him which recovers, becauſe the miſe ſhal be joyned only upon the mere right, &c. Yet in this caſe the ſeiſin of him in the remainder was defeated by the entry of the tenant for life. But peradventure ſome will argue and ſay, that hee ſhall not have a writ of right in this caſe, for that when the miſe is joyned, it is joyned in this manner, (*ſcilicet*) if the tenaunt hath more mere right in the land in the manner

en le maner come il demanda, et pur ceo que le ſeiſin del demandant fuit defeat per l'entry de le tenant a terme de vie, &c. donque il ad nul droit en le manner come il demaund.

as he holdeth, than the demandant hath in the manner as hee demandeth, and for that the ſeiſin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the manner as he demandeth.

38 E. 3. 8. Tit. Juris Utrum 1.

HERE a diſſeiſin gotten by wrong, and defeated by the entrie of him that right hath, is ſufficient to maintaine a writ of right againſt the recoveror in this caſe, for albeit the ſeiſin is defeated betweene the leſſee for life and him in the remainder, [281. a.] yet having regard to the recoveror, who is a meere ſtranger, and hath no title, it is ſufficient againſt him. But otherwiſe it is againſt the party himſelfe that defeated the ſeiſin, and the Law is propenſe to give remedie to him that right hath. And where ſome have thought, that there is no authority in law to warrant *Littleton's* opinion herein, they are greatly miſtaken, for *Littleton* hath good warrant for all that he hath written.

7 E. 3. 62. 38 E. 3. 37. tit. Jur. Utr. 1. (Poſt. 315. a.)

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.*; *A.* dieth, *B.* entreth and dieth; a ſtranger intrudeth, the heire of *A.* ſhall have a writ of right of the ſeiſin which *A.* had as tenant for life.

(Ant. 184. a. b.)

Lands are letten to *A.* and *B.* and to the heires of *A.*; *A.* dyeth; a recovery is had againſt *B.*; the heire of *A.* ſhall have a writ of right of the whole, for every joyntenant is ſeiſed *per my et per tout.*

If lands be given in tayle, the remainder to *A.* in fee, the donee dyeth without iſſue, his wife *privement enſeint*, *A.* entreth, the iſſue is borne and entreth upon him and dyeth without iſſue, *A.* ſhall have a writ of right of the ſeiſin which he had.

4 E. 3. 16, 17.

If lands be given in tayle to *A.* the remainder to his right heires, *A.* dieth without iſſue, the collaterall heire of *A.* ſhall have writ of right of the ſeiſin of *A.*

(Ant. 14. b. 15. a.) 40 E. 3. 8. 42 E. 3. 20. 37 Aſſ. 4. 24 E. 4. 24.

And ſo note a diverſity betweene a ſeiſin to cauſe *poſſeſſio fratris*, &c. for there is required a more actuall ſeiſin, and a ſeiſin to maintaine a writ of right. And hereby alſo are the (&c.) in this Section explained.

7 H. 3. 4, 11 H. 4. 11.

(Yelv. 148. Hob. 73. 105.) (6 Rep. 24.)

Sect. 483.

ACEO poit eſtre dit, que ceux parols (modo et formâ prout, &c.) *in mults des caſes ſont parols de forme de pleder, et nemy parols de ſubſtance. Car ſi home port briefe d'entre* in caſu proviſo, *del alienation fait per le tenant en dower a ſon diſinheritance, et counta del alienation fait en fee, et le tenant dit, que il ne aliena pas en le manner come le demaundant ad declare, et ſur ceo ſount a iſſue, et trove*

TO this it may bee ſaid, that theſe words (*modo et formâ prout, &c.*) in many caſes are words of forme of pleading, and not [281. b.] words of ſubſtance. For if a man bring a writ of entrie *in caſu proviſo*, of the alienation made by the tenant in dower to his diſinheritance, and counteth of the alienation made in fee, and the tenant ſaith, that he did not alien in maner as the demandant hath

trove eſt per verdict, que le tenant alyenaſt en le taile, ou pur terme d'auter vie, le demaundant recovera: uncore l'alyenation ne fuit en le manner come le demaundant avoit declare, &c.

hath declared, and upon this they are at iſſue, and it is found by verdict that the tenant aliened in taile, or for tearme of another man's life, the demandant ſhall recover: yet the alienation was not in manner as the demandant hath declared, &c.

WHERE *modo et formâ* are of the ſubſtance of the iſſue, and where but words of forme, this diverſity is to be obſerved. [c] Where the iſſue taken goeth to the point of the writ or action, there *modo et formâ* are but words of forme, as here in the eaſe of the writ of entrie *in caſu proviſo*, and ſo is the (*&c.*) well explained in this Section. But otherwiſe it is when a collaterall point in pleading is traverſed; as if a feoffment be alleadged by two, and this is traverſed *modo et formâ*, and it is found the feoffment of one, there *modo et formâ* is materiall. So if a feoffment be pleaded by deede, and it is traverſed *abſque hoc quòd feoffavit modo et formâ* upon this collaterall iſſue, *modo et formâ* are ſo eſſentiall as the jury cannot find a feoffment without deed.

[c] 9 H. 6. 1, 40 E. 3. 35. 21 E. 4. 22. F. N. B. 206. g. 40 E. 3. 5. 32 H. 8. iſſue. Br. 80. Vid. Sect. ſequent. 12 E. 4. 4. (Doc. Pla. 175, 199, 344, 345.)

Sect. 484.

*AUXY, ſi ſoient ſeignior et tenant, et le tenant tient del ſeignior per fealtie ſolement, * et le ſeignior diſtreine le tenant pur rent, et le tenant porta briefe de treſpas envers ſon ſeignior de ſes avers iſſint priſes, et le ſeignior plede que le tenant tient de luy per fealtie et certain rent, et pur le rent arere il vient a diſtreiner, &c. et demaunde judgement de briefe port vers luy* quare vi et armis, &c. *et l'auter dit, que il ne tient de luy en le maner come il ſuppoſe, et ſur ceo ſont a iſſue, et trove eſt per verdict que il tient de luy per fealtie tantùm; en ceſt caſe le briefe abatera, et uncore il ne tient de luy en le maner come le ſeignior avoit dit. Car le matter de l'iſſue eſt, lequel le tenant tient de luy ou nemy; car s'il tient de luy, coment que le ſeignior diſtreina le tenant pur auter ſervices que ne doit aver, uncore tiel briefe de treſpaſſe,* quare vi et armis, &c. *ne giſt envers le ſeignior, mes ſerra abate.*

ALSO, if there bee lord and tenant, and the tenant hold of the lord by fealty only, and the lord diſtreine the tenant for rent, and the tenant bringeth a writ of treſpaſſe againſt his lord for his cattell ſo taken, and the lord plead that the tenant holds of him by fealtie and certaine rent, and for the rent behinde he came to diſtreine, &c, and demand judgement of the writ brought againſt him, *quare vi et armis, &c.* and the other ſaith that hee doth not hold of him in the manner as he ſuppoſe, and upon this they are at iſſue, and it is found by verdict that he holdeth of him by fealty onely; in this caſe the writ ſhall abate, and yet hee doth not hold of him in the manner as the lord hath ſaid. For the matter of the iſſue is, whether the tenant holdeth of him or no; for if hee holdeth of him, although that the lord diſtreine the tenant for other ſervices which he ought not to have, yet ſuch writ of treſpaſſe *quare vi et armis, &c.* doth not lie againſt the lord, but ſhall abate.

* *et—ſi*, L. and M. and Roh.

Vi. Sect. preced. (8 Co. 89. Sid. 15.) 10 E. 4. 7. 8 E. 4. 15. 20 E. 4. 3. 21 E. 4. 3. Merlebr. cap. 3. (Doc. Pla. 191. 344.) (9 Rep. 33.) (Doc. Pla. 191. Ant. 227. 2 Roll. Abr. 704. 708. Sid. 5. Hob. 18. 73. 81. Doc. Pla. 333. 344. 345.) Pl. Com. 101. (9 Rep. 348. 1 Cro. 14. 16. Haw. P. C. 266.)

"*TROVE eſt per verdict, que il tient per fealtie tantùm.*" Here is another diverſitie to be obſerved: That albeit the iſſue bee upon a collaterall point, yet if by the finding of part of the iſſue it ſhall appeare to the court that no ſuch action lieth for the plaintife no more than if the whole had been found, there *modo et formâ* are but words of forme, as here in the caſe which *Littleton* putteth of the lord and tenant appeareth.

"*Car le matter del iſſue eſt lequel il tient de luy ou nemy, &c.*" Here it appeareth, that if the matter of the iſſue be found it is ſufficient. And this rule holds in criminall cauſes. For if *A.* be appealed, or indicted of murder, *viz.* that hee of malice prepenſed killed *I. A.* pleadeth that he is not guilty *modo et formâ*, yet the jury may find the defendant guiltie of manſlaughter without malice prepenſed, becauſe the killing of *I.* is the matter, and malice prepenſed is but a circumſtance. [282. a.]

6 E. 3. 41. b. 28 E. 3. 50. 9 H. 7. 3. 13 H. 7. 14. 29 E. 3. 38. (Sid. 21, 22.) (Doc. Pla. 348.)

In aſſiſe of *darreine preſentment*, if the plaintife alleage the avoydance of the church by privation, and the jurie find the voydance by death, the plaintife ſhall have judgment; for the manner of voydance is not the title of the plaintife, but the voydance is the matter.

[d] 8 E. 3. 70. 9 Aſſ. 29 & 39. 9 E. 3. 338. 24 E. 3. 34. 5 H. 4. 2. 7 H. 4. 11. Pl. Com. 92. 3 Mar. Dier 116. 40 E. 3. 35. Dier 2 & 3 Ph. & Mar. 115. b. Trin. 22 Eliz. Rot. 920. Wolman's caſe.

[d] If a gardeine of an hoſpitall bring an aſſiſe againſt the ordinary, he pleadeth that in his viſitation he deprived him as ordinary, whereupon iſſue is taken, and it is found that he deprived him as patron, the ordinary ſhall have judgement, for the deprivation is the ſubſtance of the matter.

The leſſee covenant with the leſſor not to cut downe any trees, and bind himſelf in a bond of forty pounds for performance of covenants, the leſſee cut downe ten trees, the leſſor bringeth an action of debt upon the bond, and aſſigneth a breach that the leſſee cutteth down twenty trees, whereupon iſſue is joined, and the jury finde that the leſſee cut downe ten, judgement ſhall be given for the plaintife; for ſufficient matter of the iſſue is found for the plaintife.

41 E. 3. 28. 34 Aſſ. 3. 30 Aſſ. 5. 33 E. 3. verdict 47. 22 E. 3. 1. b. 18 E. 3. 46. 21 E. 3. account 58. 28 Aſſ. 48. (2 Roll. Abr. 704. 719.)

Sect. 485.

AUXY, en briefe de treſpaſſe de batterie, ou des biens emports, ſi le defendant plede de rien culpable, en le manner come le plaintife ſuppoſe, et trove eſt que le defendant eſt culpable en auter ville, ou a auter jour que le plaintife ſuppoſe, uncore il recovera. Et † iſſint en ‡ pluſors auters caſes ceux parols,* ſcilicet, *en le maner come le*

ALSO, in a writ of treſpaſſe for batterie, or for goods carried away, if the defendant plead not guilty, in manner as the plaintife ſuppoſe, and it is found that the defendant is guiltie in another towne, or at another day than the plaintife ſuppoſes, yet hee ſhall recover. And ſo in many other caſes theſe words, *viz.*

* *en—un*, L. and M. and Roh.
† *iſſint* not in L. and M. nor Roh.
‡ *moltes* added in L. and M. and Roh.

*le demaundant ou le plaintife ad ſuppoſe, ne ſont aſcun * matter de ſubſtance del iſſue: car en briefe de droit, lou le miſe eſt joyne ſur le mere droit, il eſt a tant a dire, et a tiel effect, ſcilicet, lequel ad pluis mere droit, le tenant ou le demandant al choſe en demand.*

viz. in manner as the demandant or the plaintife hath ſuppoſed, do not make any matter of ſubſtance of the iſſue: for in a writ of right, where the miſe is joyned upon the meere right, that is as much as to ſay, and to ſuch effect, *viz.* whether the tenant or demaundant hath more meere right to the thing in demand.

"*EN briefe de treſpaſſe de battery, et des biens emports, &c.*" (11 Rep. 5.)

Here *Littleton* ſpeaketh of actions brought for things tranſitory. In which caſes the wrong being done in one towne, the plaintife may not only alledge it in another towne, as *Littleton* here ſaith, but alſo in another county, and the jurors upon not guilty pleaded are bound to find for the plaintife. (7 Rep. 2. b. 2 Roll. Abr. 688. Doc. Pla. 93. 369. 386.)

Neither can the aſſault, battery, or taking of goods, &c. alledged in another county, be traverſed without ſpeciall cauſe of juſtification which extendeth to ſome certaine place; as if a conſtable of a towne in another county arreſt the body of a man that breaketh the peace, there he may traverſe the county (but he muſt not reſt there) but all other places ſaving in the towne whereof he is conſtable. And ſo it is of taking of goods, if the defendant juſtifie for damage feaſant in another county he muſt traverſe as before. But where the cauſe of the juſtification is not reſtrained to a certaine place, that is ſo locall as it cannot be alledged in any other towne, as in the caſes before alledged, and the like, then albeit the action bee brought in a forraine countie, yet he muſt alledge his juſtification in the county where the action is brought. As if a man be beaten in the county of *Middleſex*, and hee bringeth his action in the county of *Buck.* the defendant cannot pleade that the plaintife aſſaulted him in the county of *Midd. &c.* and traverſe the county, but he muſt pleade his juſtification in the county of *Buck.* for that the cauſe of his juſtification is good in any place. And ſo it is in caſe of bailement of goods, and other caſes for tranſitory things; as for example. (1 Roll. Abr. 335. Heb. 103, 104. Doc. Pla. 367. 5 Rep. 77. (1 Rep. 1. 396.) 6 Rep. 65. b.) (Doc. Pla. 367. 2 Cro. 45. 372. Noy 57. 3 Cro. 353. Doc. Pla. 361.) (1 Leo. 39. Sid. 264. 294. 3 Rep. 52. b. Ant. 145. b. Doc. Pla. 43. 2 Sid. 118. Cro. El. 99.)

[282. b.]

In an action upon the caſe the plaintife declared for ſpeaking of ſlanderous words, which is tranſitory, and laid the words to be ſpoken in *London*, the defendant pleaded a concord for ſpeaking of words in all the counties of England, ſaving in *London*, and traverſed the ſpeaking of the words in *London*; the plaintife in his replication denied the concord, whereupon the defendant demurred, and judgment was given for the plaintife. For the court ſaid, that if the concord in that caſe ſhould not be traverſed, it would follow, that by a new and ſubtile invention of pleading, an ancient principle in law (that for tranſitorie cauſes of action the plaintife might alledge the ſame in what place or county he would) ſhould be ſubverted, which ought not to be ſuffered; and therefore the judges of both courts allowed a traverſe upon a traverſe in that caſe: and the wiſedome of the judges, and ſages of the law have always ſuppreſſed new and ſubtile inventions in derogation of the common law. And therefore the

Trin. 30 Eliz. in the king's bench, between Inglebert and Jones. And herewith agreeth a judgement in the court of com. pleas, Paſch. 38 Eliz. Rot. 1656.

* *matter—manner*, L. and M. and Roh.

[e] 38 E. 3. 1. (1 Cro. 105. Ant. 72. Mo. 350. 2 Cro. 372.) [f] 2 H. 4. 18. 31 E. 3. Gager. deliver. 5.

the judges ſay in one booke [e], We will not change the law which alwayes hath been uſed. And another ſaith [f], It is better that it be turned to a default, than the law ſhould be changed, or any innovation made.

A man did grant a rent, with a new invented clauſe of diſtreſſe, viz. that the grantee ſhould hold the diſtreſſe againſt gages and pledges; and yet by the whole court he ſhall gage deliverance, for otherwiſe by this new invention all replevyes ſhall be taken away.

[*] 42 Aſſ. 12. 4 E. 3. ca. 5. 18 E. 3. ca. 1. & ca. 6. 4 H. 4. ca. 2.

[*] See many other new inventions in derogation of the common law diſallowed by the judges, and by the court of parliament.

[h] Li. 6. fo. 46, 47. Dowdale's caſe. 3 E. 3.

[h] Where the jury is bound to finde aſwell locall things in many caſes as tranſitory in other counties, ſee at large in my Reports.

Aſſ. 446. 27 E. 3. 86. 1 Aſſ. 16. 3 Aſſ. 4. 6 Aſſ. 4. 5 Aſſ. 7. 18 E. 3. 38. 21 Aſſ. 8. 29 Aſſ. 5. 44 E. 3. 6. b. 14 H. 4. 35. 5 H. 5. 2. 10 H. 6. 13. 21 H. 6. 51. 37 H. 6. 2. 7 E. 4. 45. 18 E. 4. 1. 22 E. 4. 19. 13 H. 7. 17. 2 Mar. Br. attaint. 104. 10 Eliz. Dier 171.

[i] 19 H. 6. 48. 11 H. 6. 16. 43 E. 3. 23. b. 46 E. 3. 3. a. 9 H. 6. 62. 21 H. 6. 27. 14 H. 8. 24.

By this which hath beene ſaid you ſhall know the law as it is now in uſe in theſe caſes, and the better underſtand our [i] bookes, when you ſhall reade them concerning as well locall as tranſitory things, wherein you ſhall finde great variety of opinion in our bookes.

18 E. 4. 1. 20 H. 6. 2. 34 H. 6. 42. 14 H. 6. 21, 22. 4 H. 6. 13. 33 H. 6. 25. 12 E. 4. 12. 28 H. 8. Dier 29. 21 E. 4. 19. 80. 27 H. 8. 19. 12 H. 8. 1. 11 H. 4. 65. 29 H. 8. 6. (Hob. 134. 1 Leo. 301. Cro. Car. 514. Cro. Ja. 366.)

"*Si le defendant plead de rien culpable.*" This is a good iſſue, if the defendant committed no battery at all; but regularly by the common law if the defendant hath cauſe of juſtification or excuſe, then can he not pleade not guilty, for then upon the evidence it ſhall be found againſt him, for that he confeſſeth the battery, and upon that iſſue cannot juſtifie it, but he muſt pleade the ſpeciall matter, and confeſſe and juſtifie the battery.

The like law is in other caſes, and therefore this is a learning neceſſary to be knowne, for that the loſſe of moſt cauſes dependeth thereupon. As if in battery the defendant may juſtifie the ſame to be done of the plaintife's owne aſſault, he muſt pleade it ſpecially, and muſt not pleade the generall iſſue, and ſo of the like. In treſpaſſe of breaking his cloſe, upon not guilty he cannot give in evidence, that the beaſts came thorow the plaintife's hedge, which he ought to keep, nor upon the generall iſſue juſtifie by reaſon of a rent-charge, common, or the like. [283. a.]

25 H. 8. Br. (Doc. Pla. 197.) 22 H. 6. 33. (4 Rep. 33. 2 Roll. Rep. 491. Poſt. 303. 1 Leo. 228.)

In detinue the defendant pleadeth *non detinet*, he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but muſt pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintife's goods.

[d] 12 H. 8. 1. 19 E. 3. Waſt. 30. 20 E. 3. Waſt. 32. [e] 10 Eliz. Dier 276. 2 Mar. Dier 212.

[d] So in an action of waſte, upon the plea *nul waſt fait*, he may give in evidence any thing that proveth it no waſte, as by tempeſt, by lightening, by enemies, and the like; but he cannot give in evidence juſtifiable waſte, as to repaire the houſe, or the like. [e] If one doth waſte, and before the action brought the leſſee repaireth it,

it, and after the leſſor bringeth an action of waſte, and the leſſee pleade *quòd non fecit vaſtum*, he cannot give in evidence the eſpeciall matter.

If two men be bound in a bond jointly, and the one is ſued alone, he may plead this matter in abatement of the writ; but he cannot plead *non eſt factum*, for it is his deed, though it be not his ſole deed. [*f*] See in *Whelpdale's* caſe, where a man may ſafely plead *non eſt factum*, and where not, and the former books that treat of that matter well reconciled. (1 Sid. 450. Doc. Pla. 198.)

[*f*] Lib. 5. fo. 119. Whelpdale's caſe. 7 E. 4. 5.

7 E. 6. Br. non eſt fact. 14. 1 H. 7. 15, 14 H. 8. 28. Pl. Com. Dive and Man caſe. 36 H. 8. Dier 59. 2 Mar. Dier 112. 1 Eliz. Di. 167.

[*g*] Upon *plènè adminiſtravit* pleaded by an executour, *et iſſint riens inter mains*, if it be proved that he hath goods in his hands which were the teſtatour's, he may give in evidence that he hath paid to that value of his owne mony, and need not plead it ſpecially. (1)

[*g*] Hill. 10 H. 8. Rot. 323. in com. banc. et Mich. 6 E. 6. in com. banco. Bendloes.

In an aſſiſe, if the tenant plead *nul tort nul diſſeiſin*, he cannot give in evidence a releaſe after the diſſeiſin; but a releaſe before the diſſeiſin he may, for then there is no diſſeiſin upon the matter. 7 H. 5. 9. 6 H. 7. 10. 34 E. 3. Droit. 29.

In a writ of right, if the tenant joyne the miſe upon the meere right, he cannot give in evidence a collaterall warranty; for he hath not any right by it, and therefore it ought to have been pleaded. 9 E. 3. 32. 8 E. 3. 24. 33 E. 3. Verd. 18 H. 6. 24. 39 H. 6. 38. 18 E. 3. 19.

Of this learning you ſhall reade plentifully in our bookes, and in my Reports. This little taſte ſhall here ſuffice to make the reader capable of the reſt. Regularly whenſoever a man doth any thing by force of a warrant or authority, he muſt plead it. Pl. Com. 81. 173. 21 H. 7. 76. 16 Kielw. 21 E. 4. 11. 22 E. 4. 45.

But all that hath been ſaid muſt be under two cautions: firſt, that whenſoever a man cannot have advantage of the ſpeciall matter by way of pleading, there he ſhall take advantage of it in the evidence. For example, the rule of law is, that a man cannot juſtifie in the killing or death of a man; and therefore in that caſe he ſhall be received to give the eſpeciall matter in evidence, as that it was *ſe defendendo*, or in defence of his houſe in the night againſt theeves and robbers, or the like. 13 H. 7. 13. Stanf. Pl. Cor. 15. 22 Aſſ. 55. 37 H. 6. 21. (Doc. Pla. 198. Ant. 227. a. Hob. 174. Poſt. 303. b.)

Secondly, that in any action upon the caſe, treſpaſſe, battery, or of falſe impriſonment againſt any juſtice of peace, maior, or bailiſe of city or towne corporate, headborough, port-reve, conſtable, tithingman, collector of ſubſidy or fifteen, in any his majeſty's courts in *Weſtminſter*, or elſewhere, concerning any thing by any of them done by reaſon of any of their offices aforeſaid, and all other in their aide or aſſiſtance, or by their commandement, &c. they may pleade the generall iſſue, and give the ſpeciall matter for their excuſe or juſtification in evidence. 7 Ja. ca. 5.

In an action of treſpaſſe or other ſuit againſt any perſon for taking of any diſtreſſe or other act doing by force of the commiſſion of ſewers, the defendant in any ſuch action ſhall and may make avowry, conuſance, or juſtification generally, that it was done by authority of the commiſſion of ſewers for lotte or taxe aſſeſſed by that commiſſion, &c. and the plaintife ſhall reply he did it of his owne wrong without ſuch cauſe. And both theſe acts were made for avoiding of prolixity and captiouſneſſe of pleading, tending to the 23 H. 8. ca. 5.

(1) [See Note 245.]

the great charge and danger of officers and miniſters of juſtice, &c. Evidence, *evidentia*. This word in legall underſtanding doth not only containe matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under ſeale, as charters and deeds, and other writings without ſeale, as court rolles, accounts, and the like, which are called evidences *inſtrumenta*, but in a larger ſenſe it containeth alſo *teſtimonia*, the teſtimony of witneſſes, and other prooſes to be produced and given to a jury, for the finding of any iſſue joined betweene the parties. And it is called evidence, becauſe thereby the point in iſſue is to be made evident to the jury. *Probationes debent eſſe evidentes (id eſt) perſpicuæ et faciles intelligi.* But let us now returne to *Littleton*.

[h] 19 H. 6. 47. 5 E. 4. 5. 21 E. 4. 66. Cro. Jac. 366. 1 Cro. 501. 514, 515. 228, 229. 2 Cro. 202. Sid. 308.

"*Ou a auter jour que le plaintife ſuppoſe.*" [h] As if the treſpaſſe were done the fourth of May, and the plaintife alledgeth the ſame to be done the fifth of May, or the firſt of May, when no treſpaſſe was done; yet if upon the evidence it falleth out that the treſpaſſe was done before the action brought, it ſufficeth: and this is warranted by *Littleton*, who ſpeaketh indefinitely, that the jury may find the defendant guilty at another day than the plaintife ſuppoſeth.

"*Et a tiel effect.*" Here is to be obſerved, that the law of England reſpecteth the effect and ſubſtance of the matter, and not every nicety of forme or circumſtance: *Qui hæret in literâ, hæret in cortice, et apices juris non ſunt jura.* [283. b.]

Sect. 486.

*ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor devie ſeiſie, &c. et ſon fits et heire eſt eins per diſcent, et le diſſeiſee enter ſur l'heire diſſeiſor, lequel entrie eſt un diſſeiſin, &c. ſi l'heire port aſſiſe, ou briefe * de entre en nature de aſſiſe, il recovera.*

ALSO, if a man be diſſeiſed, and the diſſeiſor dyeth ſeiſed, &c. and his ſonne and heire is in by diſcent, and the diſſeiſee enter upon the heire of the diſſeiſor, which entrie is a diſſeiſin, &c. if the heire bring an aſſiſe, or a writ of entrie in nature of an aſſiſe, hee ſhall recover.

AND the reaſon hereof is, for that in the writ of right mentioned in the next Section, the charge of the grand aſſiſe upon their oath is upon the meere right, and not upon the poſſeſſion.

* *de entre en nature de aſſiſe il recovera. Mes ſi l'heire port* (the beginning of next Section) not in L. and M. nor Roh. but in both MSS.

Sect. 487.

MES ſi l'heire port briefe de droit envers le diſſeiſee, il ſerra barre, pur ceo que quant le graund aſſiſe eſt jure, lour ſerement eſt ſur le mere droit, et nemy ſur le poſſeſſion. Car ſi l'heire le diſſeiſor † ſuiſt un aſſiſe de novel diſſeiſin, *ou briefe* d'entre *en nature d'aſſiſe, et recoveraſt vers le diſſeiſee, et ſuiſt execution, uncore poit le diſſeiſee aver briefe* d'entre en le per *envers luy de le diſſeiſin fait a luy per ſon pere, ou il poit aver envers l'heire briefe de droit.*

BUT if the heyre bring a writ of right againſt the diſſeiſee, he ſhall bee barred, for that when the graund aſſiſe is ſworne, their oath is upon the meere right, and not upon the poſſeſſion. For if the heyre of the diſſeiſor ſue an aſſiſe of *novel diſſeiſin*, or a writ of *entrie* in nature of an aſſiſe, and recovers againſt the diſſeiſee, and ſueth execution, yet may the diſſeiſee have a writ of *entrie* in the *per* againſt him, for the diſſeiſin made to him by his father, or he may have againſt the heire a writ of right.

"*CAR ſi le heire le diſſeiſor, &c.*" Here is a diverſity to be obſerved concerning that which hath been ſaid, when the poſſeſſion ſhall draw the right of the land to it, and when not. And therefore when the poſſeſſion is firſt, and then a right commeth thereunto, the entry of him that hath right to the poſſeſſion ſhall gaine alſo the right which, as before it appeareth in thoſe caſes there put, followeth the poſſeſſion, and the right of poſſeſſion draweth the right unto it; but when the right is firſt, and then the poſſeſſion commeth to the right, albeit the poſſeſſion be defeated, (as here in *Littleton*'s caſe it is by the heire of the diſſeiſor,) yet the right of the diſſeiſee remaineth. (Ant. 266. a.) 6 E. 3. 7. Vid. Sect. 447.

"*Briefe d'entrie en le per.*" *A.* dyeth ſeiſed, and the land deſcendeth to *B.* his ſonne; before he entreth an eſtranger abateth and dyeth ſeiſed, *B.* entreth, againſt whom the heire of the abator recovereth in an aſſiſe, *B.* may have a writ of *mort d'anceſter*, and recover the land againſt him. And if the diſ- [284. a.] ſeiſin had beene done to *A.* &c. then after the recovery in the aſſiſe, *B.* ſhould have had a writ of *entrie* in the *per*, becauſe the heyre that is in by diſcent is in the *per*. 5 Aſſ. 1. 10 Aſſ. 16.

Sect. 488.

MES ſi le heyre doit recover envers le diſſeiſee en le caſe avantdit per briefe de droit, donque tout ſon droit ſerroit clerement ale, pur ceo que judgement final ſerroit done envers luy, que ſerroit encounter reaſon lou le diſſeiſee ad le pluis meere droit, &c.

BUT if the heire ought to recover againſt the diſſeiſee in the caſe aforeſaid by a writ of right, then all his right ſhould be cleerely taken away, for that judgement finall ſhall bee given againſt him, which ſhould bee againſt reaſon where the diſſeiſee hath the more meere right.

† *ſuiſt—porta*, L. and M. and Roh.

"*Judgement final.*" The forme whereof you ſhall ſee in the laſt Section of this chapter.

Vid. Sect. 87, &c. (Poſt. 295. b.) "*Que ſerra encounter reaſon.*" *Argumentum ab inconvenienti.*

Sect. 489.

ET ſaches, mon fits, que en briefe de droit, apres ceo que les quater chivalers ont eſlie le grand aſſiſe, donques il n'ad pluis greinder delay que en un brief de formedon, *apres ceo que les parties ſont a iſſue, &c. Et ſi le miſe ſoit joyne ſur le battaile, donques il ad meindre delay.*

AND know (my ſonne) that in a writ of right, after the foure knights have choſen the grand aſſiſe, then he hath no greater delay than in a writ of *formedon*, after the parties be at iſſue, &c. And if the miſe bee joyned upon battaile, then hee hath leſſer delay.

(Poſt. 294. b.) "*BATTAILE.*" See for this word in the laſt Section of this chapter.

(5 Rep. 104.) "*Iſſue, &c.*" Or demurrer, which is an iſſue in law.

(2 Inſt. 244.) (Ant. 266, 267.)

Sect. 490.

ITEM, releaſe de tout le droit, &c. en aſcun caſe eſt bone, fait a celuy que eſt ſuppoſe tenant en ley, coment que il n'ad riens en les tenements. Si conie en præcipe quòd reddat, *ſi le tenant aliena la terre pendant le briefe, et puis le demaundant releſſa a luy tout ſon droit, &c. cel releaſe eſt bone, pur ceo que il eſt ſuppoſe d'eſtre tenant per le ſuit del demandant, et uncore il n'ad riens en la terre al temps de releaſe fait.*

ALSO, a releaſe of all the right, &c. in ſome caſe is good, made to him which is ſuppoſed tenant in law, albeit he hath nothing in the tenements. As in a *præcipe quòd reddat*, if the tenant alien the land hanging the writ, and after the demandant releaſeth to him all his right, &c. this releaſe is [284. b.] good, for that he is ſuppoſed to be tenant by the ſuit of the demandant, and yet hee hath nothing in the land at the time of the releaſe made.

Sect. 491.

EN meſme le maniner eſt ſi en præcipe quòd reddat *le tenant vouche, et le vouchee entre en le garrantie, ſi apres le demandant releſſa al vouchee tout ſon droit *, ceo eſt aſſets bone,*

IN the ſame manner it is in a *præcipe quòd reddat* the tenant vouch, and the vouchee enters into warranty, if afterward the demandant releaſe to the vouchee all his right, this is

* &c. added L. and M. and Roh.

bone, pur ceo que le vouchee apres ceo que il avoit enter en le garrantie, eſt tenant en ley al demandant, † *&c.*

is good enough, for that the vouchee after he hath entred into warranty, is tenant in law to the demandant, &c.

HERE it doth appeare, that there is a tenant in deed and a tenant in law, and *Littleton* in this and the next Section putteth two examples of tenants in law, *viz.* [*h*] the tenant to a *præcipe* after alienation, and of the vouchee, whereof ſomewhat hath been ſaid before.

[*h*] 10 E. 4. 12. 12 Aſſ. 41. 22 Aſſ. 18. 23 E. 3. 21. 25 E. 3. 40. 38 E. 3. 10. 11. 7 E. 3. 6. 19 E. 3. tit. Reſceit. 34 E. 3. tit. Reſceit. 9 E. 4. 16. 39 H. 6. 40. 17 Aſſ. 24. 8 H. 7. 5. 20 Aſſ. 2. 14 E. 3.

And it is obſervable, that *Littleton* ſaith, that in both caſes hee is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an anceſtor collaterall of the demandant releaſeth to the vouchee with warranty, he ſhall not plead this againſt the demandant, for that the releaſe by the eſtranger is voide, which, beſides the authorities before vouched, appeareth by *Littleton* himſelfe; * for he ſaith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in reſpect of any eſtranger.

Procedendo 4. 9 E. 3. 17. 32 E. 3. Quare Imp. 2 Dyer. 17 Eliz. 341. Sect. 447.

* Vn devant Sect. 447. (Ante 265. b. 273. a.)

Sect. 492.

ITEM, quant al releaſes d'actions, reals et perſonals, il eſt iſſint, que aſcuns actions ſont mixt en le realty et en le perſonaltie: ſicome un action de waſte ſue envers tenant a terme de vie; ceſt action eſt ‡ *en le realtie, pur ceo que le lieu waſte ſerra recover; et auxy en le perſonaltie, pur ceo que treble damages ſerront recovers pur le* ‖ *tortious waſt fait per le tenant; et pur ceo en ceſt action un releas d'actions reals eſt bon plee en barre, et iſſint eſt un releas d'actions perſonals.*

ALSO, as to releaſes of actions, realls and perſonals, it is thus: Some actions are mixt in the realty and in the perſonalty: as an action of waſt ſued againſt tenant for life; this action is in the realtie, becauſe the place waſted ſhall bee recovered; and alſo in the perſonaltie, becauſe treble damages ſhall bee recovered for the wrongfull waſte done by the tenant; and therefore in this action a releaſe of actions reals is a good plea in barre, and ſo is a releaſe of actions perſonals.

NOTA, there be two kind of actions, *viz.* one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concerne common pleas, *placita communia, ſeu civilia.* Of that which concerneth pleas of the crowne, *Littleton* ſpeaketh hereafter in this chapter. Of actions concerning common pleas, *Littleton* ſpeaketh in this place. And theſe are threefold (that is to ſay), reall, perſonall, and mixt. *Placitorum aliud perſonale, aliud reale, aliud mixtum.* Or, *Actionum quædam ſunt in rem,* [285. a.] *quædam in perſonam, et quædam mixtæ.* And generally, *actio* is defined, [*i*] *Actio nihil aliud eſt quàm jus proſequendi in judicio quod ſibi debetur.* Or, *Action n'eſt auter choſe que loyall demande de ſon droit.*

Glan. li. 1. ca. 1. Bract. li. 3. fo. 101. Brit. fo. 71. Flet. li. 1. ca. 15 & 16. Mir. ca. 2. § 1. Bract. ub. ſup. Flet. li. 1. ca. 1. (Pla. 484.)

[*i*] Vide Sect. 444. Bract. lib. 3. fol. 98.

Fleta lib. 1. cap. 15. Mirror cap. 2. § 1.

† *&c.* not in L. and M. nor Roh.

‡ *en* not in L. and M. nor Roh.

‖ *tortious waſt—aut de waſt*, L. and M. and Roh.

And

[k] Lib. 8. 151. Altham's caſe. 35 H. 8. Dier 57. 5 Mar. 217. Vide 36 H. 6. 8.

[k] And by the releaſe of all actions, cauſes of action be releaſed; but within a ſubmiſſion of all actions to arbitrement cauſes of action are not contained.

Vide 42 E. 3. 22, 23. (5 Rep. 8. a. 103. 77. b.)

"*Tenant pur vie.*" And ſo it is if it be brought againſt tenant for yeares, becauſe it agreeth with the reaſon of *Littleton* here rendred, viz. that the place waſted ſhall be recovered, and therefore foundeth in the realty. (Cro. Car. 171.)

"*Auxy en le perſonaltie, per ceo que treble damages ſerra recovers,*" which doe ſound in the perſonaltie. Wherefore *Littleton* concludeth, that in an action mixt a releaſe of all actions reals is a good barre, and ſo is a releaſe of all actions perſonals.

And here is to be obſerved a diverſity betweene the act of the party, and an act in law; for a man by his owne act cannot alter the nature of his action; and therefore if the leſſee for life or leſſee for yeares doe waſte, now is an action of waſte given to the leſſor, wherein he ſhall recover two things, viz. the place waſted, and treble damages: in this caſe if the leſſor releaſe all actions realls, he ſhall not have an action of waſte in the perſonalty only; and if he releaſe all actions perſonals, he ſhall not have an action of waſte in the realty only.

[l] 19 H. 6. 66. 14 H. 6. 14. 11 R. 2. Waſt. 99. 14 H. 8. 14. 23 H. 8. Br. Waſte. (5 Rep. 75.) (Noy 118.)

[l] And ſo it is if the leſſee doth waſte, and after ſurrendreth to the leſſor his eſtate, and the leſſor accept thereof, the leſſor ſhall not have an action of waſte.

But by act in law the nature of the action may be changed; as if a man make a leaſe *pur terme d'auter vie*, and the leſſee doth waſte, and then *ceſty que vie* dyeth, an action of waſte ſhall lye for damages only, becauſe the other is determined by act in law.

11 H. 6. 43. 9 E. 4. 50. 24 E. 3. 72. 18 E. 3. 28. 9 H. 6. 30. (7 Rep. 77. 80. a.) (Sid. 61. Hob. 322.)

And againe, hereupon is another diverſity to be obſerved, that in caſe when an action is well begun, and part of the action determineth by act in law, and yet the like action for the reſidue is given, there the writ ſhall not abate, but proceed. But where by the determination of part the like action remaineth not for the reſidue, there the action well commenced ſhall abate. As if an action of waſte be brought againſt tenant *pur terme d'auter vie*, and hanging the writ *ceſty que vie* dyeth, the writ ſhall not abate, but the plaintife ſhall recover damages only, becauſe if *ceſty que vie* had died before any action brought, the leſſor might have an action of waſte for the damages. So if an *ejectione firmæ* be brought, and the terme incurreth hanging the action, yet the action ſhall proceed for damages only, becauſe an *ejectione* doth lye after the terme for damages only. But if tenant *per auter vie* bring an aſſiſe, and *ceſty que vie* dyeth hanging the writ, albeit the writ were well commenced, yet the writ ſhall abate, becauſe no aſſiſe can be maintainable for damages only.

2 H. 4. 22. 6 E. 2. briefe 807. (Ant. 53. b. Plo. 18. b.)

So if an action of waſte be brought by baron and fem in remainder, in eſpeciall tayle, and hanging the writ the wife dieth without iſſue, the writ ſhall abate, becauſe every kind of action of waſte muſt be *ad exhæredationem*.

34 H. 6. 10. 9 E. 4. 39. 14 H. 7. 31. 18 E. 3. Seire facias 10. (Wm. Jones 215. Cro. Car. 171. 5 Rep. 48. b.)

If a writ of annuity be brought, and the annuity determineth hanging the writ, the writ faileth for ever, becauſe no like action can be maintained for the arrerages only, but for the annuity and arrerages.

But

But where damages only are to be recovered, there albeit by act in law the like action lyeth not afterwards, yet the action well commenced ſhall proceed; [m] as if a conſpiracy be brought againſt two, and one of them dyeth hanging the writ, it ſhall proceed.

[m] 22 R. 2. briefe 868. 18 E. 4. 1. (Doc. Pla. 47.)

And in an aſſiſe of *novel diſſeiſin*, a writ of annuity, *quare impedit*, and other mixt actions, (1) a releaſe of actions reals is a good plea, and ſo it is of a releaſe of actions perſonals.

(Ray. 180. and 176. S. C.) (1 Saun. 228. S. C. 1 Vent. 12 & 13. 2 H. 4. 18. 9 H. 6. 57. 30 H. 4. Barre 59. (2 Roll. Abr. 411. 2 Co. 58. a. Mo. 133. contra.) Ant. 197. b.)

But if three joyntenants be diſſeiſed, and they arraigne an aſſiſe, and one of them releaſe to the diſſeiſor all actions perſonals, this ſhall barre him, but it ſhall not barre the other plaintife; for having regard to them the realty ſhall bee preferred, *et omne majus trahit ad ſe minus dignum.* [n] And in a writ of ward brought by two, the releaſe of the one ſhall not grieve the other, but ſhall enure to his benefit, for he ſhall recover the whole ward, and hold his companion out.

[n] 30 H. 6. ubi ſupra. 45 E. 3. fol. 6. 18 E. 3. fol. 56. 21 H. 6. 18. a. (Doc. Pla. 47. 301.) (W. Jones. 215. contra.)

But here a diverſity is to bee obſerved betweene reall actions, wherein damages are to bee recovered at the common law, as in an aſſiſe, &c. and reall actions where damages are not to be recovered by the common law, but are given by the [o] ſtatute, for there a releaſe of all actions perſonals is no barre, as in the writ of dower, *entrie ſur diſſeiſin in le per, &c. murd'anc', aiel, &c.*

[285. b]

[o] Merton cap. 1. in dower. Glouc. cap. 1.

* Sect. 493.

(5 Rep. 97.)

ET en quare impedit, *un releas d'actions perſonals eſt bone plee, et iſſint eſt un releaſe d'actions reals,* per Martin, quod fuit conceſſum. Hill. 9 H. 6. 57.

AND in a *quare impedit* a releaſe of actions perſonals is a good plea, and ſo is a releaſe of actions reals, *per Martin, quod fuit conceſſum. Hill. 9 H. 6. fol. 57.*

THIS is an addition to *Littleton*, which although it be law, and the booke truly cited, yet I paſſe it over. But yet note by the way, that a releaſe of actions perſonals is alſo a good barre in a *quare impedit*, becauſe it is an action mixt.

9 H. 6. 57. 22 H. 6. 27. b.

Sect. 494.

ET meſme le maner eſt en aſſiſe de novel diſſeiſin, *pur ceo que il eſt mixt en le realtie et en le perſonalty. Mes ſi un tiel aſſiſe ſoit arreigne enter le*

IN the ſame manner it is in an aſſiſe of *novel diſſeiſin*, for that it is mixt in the realtie and in the perſonaltie. But if ſuch an aſſiſe bee arraigned

* This Section is not in L. and M. nor Roh.

(1) [See Note 246.]

le diſſeiſor et le tenant, le diſſeiſor bien poit plede un releas d'actions perſonals pur barrer l'aſſiſe, mes nemy un releas d'actions reals, car nul pledera releas d'actions reals en aſſiſe forſque le tenant.

arraigned againſt the diſſeiſor and the tenant, the diſſeiſor may well plead a releaſe of actions perſonals to barre the aſſiſe, but not a releaſe of actions reals, for none ſhall plead a releaſe of actions reals in an aſſiſe but the tenant.

(Poſt. 303. b.) (1 Roll. Rep. 36, 37.) (Ant. 180. b.) (Hob. 103.) [q] 11 Aſſ. 9. 18 E. 3. 2. 23, 24. 31 E. 3. quare imp. 161. 7 E. 3. 5. 9 E. 3. 6. 39 E. 3. 30. 22 E. 3. 2. 13 H. 4. 7.

"*LE diſſeiſor bien poit pleder, &c.*" *Nota*, every man ſhall plead ſuch pleas as are proper for him, and apt for his defence to be pleaded. [q] As a diſſeiſor that hath nothing in the land may pleade a releaſe of actions perſonals, becauſe damages are to be recovered againſt him, and therefore for his defence hee may plead it; but a releaſe of actions reals he cannot plead (1), becauſe he hath no eſtate in the land, and none ſhall plead a releaſe of actions reals in an aſſiſe, but the tenant of the land. *Et ſic de cæteris.* But the tenant in an aſſiſe ſhall plead a releaſe of actions perſonals to the diſſeiſor, for that plea proveth that the plaintife hath no cauſe of action againſt him.

3 E. 2. quare imp. 44. 38 E. 3. 30, 31. 5 E. 3. 26. 21 E. 3. 16, 17. 5 H. 7. 34. 8 H. 5. 14. 22 H. 6. 28, 29. 1 H. 7. 34. 27 E. 3. 81. 32 H. 6. 15. b. 17 Aſſ. 25. 2 H. 7. 14. 13 H. 8. 13, 14. 44 E. 3. 12. 46 E. 3. 13. 16 E. 4. 11. 24 E. 3. 34. 4 E. 4. 18. 7 H. 4. 34. 2 R. 2. encumbent 4. 33 E. 3. quare imp. 194. (8 Rep. 151. b.) (Sect. 278.) 13 H. 4. 2. a. (7 Rep. 26. a.)

(Sect. 471.) (10 Rep. 51. b.)

If the diſſeiſee releaſe to the diſſeiſor all actions reals, and the diſſeiſor maketh a feoffement in fee, and an aſſiſe is brought againſt them, the feoffee ſhall not plead the releaſe to the diſſeiſor, for that he is not privie to the releaſe, for a releaſe of actions ſhall only extend to privies.

If a diſſeiſor make a leaſe for life, the remainder in fee, and the diſſeiſee releaſe all actions to the tenant for life, after the death of tenant for life, he in the remainder ſhall not plead the ſaid releaſe.

If the diſſeiſee releaſe all actions to the diſſeiſor, and die, this doth barre him but for his life, for after his deceaſe his heire ſhall have an action [r], as ſome have ſaid. And hereby may appeare a manifeſt diverſity between a releaſe of a right, and a releaſe of actions.

[r] 19 H. 6. 25. a. (8 Rep. 152.)

(8 Rep. 140.)

Sect. 495. [286. a.]

ITEM, en tiels actions reals que covient d'eſtre ſue envers le tenant del franktenement, ſi le tenant ad un releas d'actions reals del demandant fait a luy devant le briefe purchaſe, et il plede ceo, il eſt bon pleepur le demandant a dire, que celuy que pleda le plee n'avoit rien en le franktene-ment

ALSO, in ſuch actions reals which ought to bee ſued againſt the tenant of the freehold, if the tenant hath a releaſe of actions reals from the demandant made unto him before the writ purchaſed, and he plead this, it is a good plea for the demandant to ſay, that hee which plead

(1) [See Note 247.]

ment al temps del releas fait, car adonque il n'avoit cauſe d'aver aſcun action real envers luy.

plead the plea had nothing in the freehold at the time of the releaſe made, for then he had no cauſe to have an action reall againſt him.

THIS is evident enough by that which hath beene ſaid, that a releaſe of all actions reals muſt bee made to him that is tenant of the land, becauſe a reall action muſt be brought againſt ſuch a tenant. (8 Rep. 151. b.)

Sect. 496.

*ITEM, en tiel cas ou home poet enter en terres ou tenements, et auxy poit aver un action real de ceo, que eſt done per la ley envers le tenant *; ſi en ceſt caſe le demandant releſſa al tenant touts maners de actions reals, uncore ceo ne tolle le demandant de ſon entrie, mes le demandant bien poit enter nient contrifteant tiel releas, pur ceo que nul choſe eſt releſſe forſque l'action, &c.*

ALSO, in ſuch caſe where a man may enter into lands or tenements, and alſo may have an action reall for this, which is given by the law againſt the tenant; if in this caſe the demandant releaſeth to the tenant all maner of actions reals, yet this ſhall not take the demandant from his entrie, but the demaundant may well enter notwithſtanding ſuch releaſe, for that nothing is releaſed but the action, &c.

"*POET enter.*" Here it appeareth, that where a man may enter, a releaſe of all actions doth not barre him of his right, becauſe he hath another remedy, *viz.* to enter. And this is agreeable with the authoritie of our [s] bookes. But where his entry is not lawful, there a releaſe of all actions is by conſequence a barre of his right, becauſe he hath releaſed the mean whereby he might recover his right. As if the diſſeiſee releaſe all actions to the heire of the diſſeiſor, which is in by diſcent, he hath no remedy to recover the land; but yet the diſſeiſee hath a right, for that hee hath releaſed his action, and not his right, as ſhall be ſaid hereafter in the chapter of *Remitter* in his proper place. If the heire of the diſſeiſor make a feoffment in fee to two, and the diſſeiſee releaſeth to one of the feoffees all actions, and he dieth, the ſurvivour ſhall not plead this releaſe for the cauſes aboveſaid. And hereby alſo again appeareth another diverſity between a releaſe of a right, and a releaſe of actions. (8 Rep. 152.) [s] 18 E. 3. 34, 19 E. 3. title 35.

[268 b.] It is to be obſerved, when a man hath ſeverall remedies for one and the ſelfe ſame thing, be it reall, perſonall, or mixt, albeit he releaſeth one of his remedies, he may uſe the other. (8 Rep. 150.) 19 Aſſ. 3. 30 E. 3. 19. 6. 19 H. 6. 4. 6. 21 H. 7. 23. b. 1 H. 6. 6.

* *&c.* added L. and M. and Roh.

Sect.

(9 Rep. 52.)

Sect. 497.

EN meſme le maner eſt de choſes perſonals; ſicome home a tort prent mes biens, ſi jeo releſſa a luy touts actions perſonals, uncore jeo puiſſe per le ley prender mes biens hors de ſon poſſeſſion.

IN the ſame manner is it of things perſonall; as if a man by wrong take away my goods, if I releaſe to him all actions perſonals, yet I may by the law take my goods out of his poſſeſſion.

This of it ſelfe is evident.

Sect. 498.

*AUXY, ſi jeo ay * aſcun cauſe d'auter brieſe de detinue de mes biens vers un auter, coment que jeo releſſa a luy touts actions perſonals, uncore jeo puiſſe † per le ley prendre mes bien hors de ſon poſſeſſion, pur ceo que nul droit de les biens eſt releſſe a luy, mes ſolement l'action, &c.*

ALSO, if I have any cauſe to have a writ of detinue of my goods againſt another, albeit that I releaſe to him all actions perſonals, yet I may by the law take my goods out of his poſſeſſion, becauſe no right of the goods is releaſed to him, but only the action, &c.

(Coke's Ent. 170. b.) (10 Rep. 119. b. 2 Cro. 681.) (Glanvil. lib. 10. cap. 13. (F.N.B. 138. a.) (1 Roll. Abr. 606.) (2 Roll. Abr. 505.) (Doc. Pla. 124, 125.) 41 E. 3. 2. (1 Roll. Abr. 5. Noy.)

"BRIEFE de detinue." *Breve de detentione dicitur à detinendo*, becauſe *detinet* is the principall word in the writ. And it lyeth where any man comes to goods, eyther by delivery, or by finding. In this writ the plaintife ſhall recover the thing detained, and therefore it muſt bee ſo certaine as it may be knowne, and for that cauſe it lyeth not for mony out of a bagge, or cheſt; and ſo of corne out of a ſacke, and the like, theſe cannot be knowne from other. [*t*] A man ſhall have an action of detinue of charters which concern the inheritance of his land if hee know the certainty of them, and what land they concerne, or if they be in bagge ſealed, or cheſt locked, though he knoweth not the certainty of them: and it is good policie (if poſſibly he can) in that caſe to declare of one charter in eſpeciall, [*u*] and then the defendant ſhall not wage his law. [*x*] An action of detinue for charters doth found in the realty, for therein ſummons and ſeverance lyeth; and in detinue of goods a *capias* doth lye; but for charters in ſpeciall a *capias* lyeth not, and yet a releaſe of actions perſonals in a writ of detinue of charters is a good barre.

[*t*] 41 E. 3. 2, 3 H. 6. 18. 28, 29. 21 E. 3. 28. 3 H. 6. 19. 30 H. 6. 4. 9 H. 6. 18. (9 Rep. 18. 78. b. F. N. B. 138.) (10 Rep. 51. b.) [*u*] 10 H. 6. 20. 21 H. 6. 1. 14 H. 6. 4. 14 H. 4. 23, 24. 27. (Poſt. 295.) [*x*] 20 H. 6. 45. 19 E. 3. Severance 14. 31 E. 3. ib. 32. 42 E. 3. 13. 40 E. 3. 25. (10 Rep. 125.) (Doc. Pla. 125.)

* *aſcun* not in L. and M. nor Roh. † *per le ley* not in L. and M. nor Roh.

Sect.

Sect. 499.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor fait feoffment a divers perſons a ſon uſe ‡, et le diſſeiſor continualment prift les profits, &c. et le diſſeiſee releſſa a luy touts actions reals, et puis il ſuiſt vers luy breve d'entre en nature d'aſſiſe per cauſe de le ſtatute, pur ceo que il prent les profits, &c. Quære, *coment le diſſeiſor ſerra aide per le dit releas; car s'il voile pleder le releas generalment, donques le demandant poit dire, que il n'avoit riens en le franktenement al temps del releas fait; et s'il pleda releas ſpecialment, donques il covient * conuſtre un diſſeiſin, et donques puit le demandant enter en le terre, &c. per ſon conuſans de le diſſeiſin, &c. mes peradventure per eſpecial pleader il luy poit barrer de l'action † que il ſuiſt, &c. coment le demandant poit enter.*

ALSO, if a man be diſſeiſed, and the diſſeiſor maketh a feoffment to divers perſons to his uſe, and the diſſeiſor continually taketh the profits, &c. and the diſſeiſee releaſe to him all actions reals, and after hee ſueth againſt him a writ of entrie in nature of an aſſiſe by reaſon of the ſtatute, becauſe hee taketh the profits, &c. *Quære*, how the diſſeiſor ſhall bee ayded by the ſaid releaſe; for if hee will plead the releaſe generally, then the demandant may ſay, that hee had nothing in the freehold at the time of the releaſe made; and if hee plead the releaſe ſpecially, then he muſt acknowledge a diſſeiſin, and then may the demandant enter into the land, &c. by his acknowledgment of the diſſeiſin, &c. but peradventure by ſpeciall pleading he may barre him of the action which he ſueth, &c. though the demandant may enter.

"*PER cauſe del ſtatute.*" That is to ſay, the ſtatute of 4 *H.* 4. *ca.* 7. and 11 *H.* 6. *ca.* 4.

"*Car s'il voet pleder le releaſe generalment.*" Here it appeareth, [287. a.] that when the ſtatute had given the action reall againſt the pernor of the profits, it enableth him to take and pleade a releaſe of all actions reals, and yet he hath neither *jus in re*, nor *jus ad rem*, which point is worthy of obſervation for manifeſtation of the equity of the law. (5 Rep. 77.) 3 H. 7. 2.

"*Donques il covient conuſtre un diſſeiſin, &c.*" In a writ of dower the tenant pleaded that before the writ purchaſed *A.* was ſeiſed of the land, &c. untill by the tenant himſelfe hee was diſſeiſed, and that hanging the writ *A.* recovered againſt him, &c. judgment of the writ, and adjudged a good plea, in which plea the tenant confeſſed a diſſeiſin in himſelfe. (8 Rep. 150.) 15 E. 4. 4. b. (Doc. Pla. 343.)

"*Donques poit le demandant enter.*" So might hee have done in this caſe that *Littleton* putteth, albeit the tenant confeſſed no diſſeiſin. And therefore it is no prejudice to the tenant to confeſſe a diſſeiſin in himſelfe, &c. and then, as *Littleton* here holdeth, the action ſhall be barred.

But

‡ *&c.* added L. and M. and Roh.
* *de* added in L. and M. and Roh.
† *que il ſuiſt, &c.* not in L. and M. nor Roh.

But the reader is to obſerve, that now by the ſtatute of 27 H. 8. cap. 10. which executes the poſſeſſion to the uſe, all the ſtatutes againſt *ceſty que uſe*, or pernor of the profits, have loſt their force.

28 H. 8. Dier 32. 27 H. 6. c. 10.

Sect. 500.

ITEM, ſi home ſuiſt appeale de felony del mort ſon anceſter envers un auter, coment que l'appellant releſſa al defendant touts maners d'actions reals et perſonals, ceo ne aidera my le defendant, pur ceo que ceſt appeale n'eſt pas action real, entant que l'appellant ne recovera aſcun realtie en tiel appeale: ne tiel appeale n'eſt pas action perſonal, en tant que le tort fuit fait a ſon anceſtor, et nemy a luy. Mes s'il releſſa a le defendant touts maners actions, donque il ſerra bone barre en appeale. Et iſſint home poit veyer que releaſe de touts maners d'actions eſt melior que releas. de actions reals et perſonals, &c.

ALSO, if a man ſue an appeale of felony of the death of his anceſter againſt another, though the appellant releaſe to the defendant, all manner of actions reall and perſonall, this ſhall not aide the defendant, for that this appeale is not an action reall, in as much as the appellant ſhall not recover any realtie in ſuch appeale: neither is ſuch appeale an action perſonall, in as much as the wrong was done to his anceſtor, and not to him. But if he releaſe to the defendant all manner of actions, then it ſhal be a good barre in an appeale. And ſo a man may ſee that a releaſe of all manner of actions is better than a releaſe of actions reals and perſonals, &c.

OUR author having ſpoken of common pleas, now treateth of certaine pleas criminall, or pleas of the crowne, wherof it is ſaid, [a] *Item, criminalium alia majora, alia minora, alia maxima, ſecundum criminum quantitatem; ſunt enim crimina majora et dicuntur capitalia eò quòd ultimum inducunt ſupplicium, &c. Minora verò, quæ juſtigationem inducunt, vel pœnam pilloralem, aut tumbarellam, vel carceris incluſionem*, &c.

[a] Bract. lib. 3. fo. 101. b.

[b] *Criminalium quædam ſententialiter mortem inducunt, quædam verò minùs.* [c] *De peche eſt briefe diviſion; car eſt mortal ou venial ſolonque ceo que eppiert es paines.* And that crime is called mortall or corporall: mortall, becauſe it deſerveth death; and ſuch crimes are called veniall, as may be redeemed or ſatisfied by ſome other puniſhment than by death.

[b] Flet. lib. 1. cap. 15.
[c] Mir. ca. 1. § 4. & ca. 4. des paines en divers maners.

[28 b.]

"*Appeale de felonie.*" [x] *Appellum* ſignifieth *accuſatio*, an accuſation, and therefore to appeale a man is as much as to accuſe him; and in [y] ancient bookes he that doth appeale is called *accuſator*, and is peculiarly in legall ſignification applyed to appeales of three ſorts. Firſt, of wrong to his anceſtor, whoſe heire male he is, and that is onely of death, whereof our author here ſpeaketh. The ſecond is of wrong to the husband, and is but the wife only of the death of her husband to be proſecuted. The third is of wrongs done to the appellants themſelves, which are called mayhem. The word *appellum* is derived of *appeller*, to call, becauſe *appellans vocat reum in judicium*, he calleth the defendant to judgement, and the plaintife is called the appellant.

[x] Mir. ca. 2. § 7. Bract. lib. 3. fo. 137. Britton. 22, 23. Flet. li. 1. ca. 31, 32, 33. (4 Rep. 39.) (3 Inſt. 131.)
[y] Glanvil. lib. 7. cap. 9. et lib. 14. ca. 1. et 3.

Et Appeale,

"*Appeale,*" *Appellatio*, is a removing of a cauſe in any eccleſiaſtical court to a ſuperior; but of this there needeth no ſpeech in this place. 24 H. 8. ca. 12. 1 El. ca. 1.

"*De mort.*" Appeale of death is of two ſorts, of murder and of homicide. Murder is when one is ſlaine with a man's will, and with malice prepenſed or forethought. Homicide, as it is legally taken, is when one is ſlaine with a man's will, but not with malice prepenſed. Chance-medly, or *per infortunium*, is when one is ſlaine caſually, and by miſadventure, without the will of him that doth the act, whereupon death inſueth; but of this no appeale doth lye. Murder commeth of the Saxon word *mordreu*. (4 Rep. 40. 43. 3 Inſt. 47.)

Were is an old Saxon word ſometime written *wera*, and ſignifieth the price of the life of a man, *eſtimatio capitis*, that is, ſo much as one paid for the killing of a man; by which it appeareth, that ſuch government was in thoſe dayes, as ſlaughters of men were moſt rarely committed, as maſter *Lambard* collecteth. And you ſhall not reade of any inſurrection or rebellion before the Conqueſt, when the view of frankpledge and other ancient lawes of this realme were in their right uſe. Lamb. Expoſ. verb. Eſtimatio. Flet. lib. 1. ca. 42. Hoved. fo. 344.

"*Mes s'il releaſe al defendant touts manners d'actions, &c.*" And the reaſon is, for that then all actions, as well criminall as reall, perſonall and mixt, be releaſed. But a releaſe of all actions reall and perſonall cannot barre an appeale of death, becauſe that releaſe extendeth to common or civil actions, and not to actions criminall: but releaſes of all actions criminall or mortall, or concerning pleas of the crowne, are good barres in an appeale of death, and ſo the (*&c.*) in the end of the Section is well explained. (4 Rep. 45. 47.) (Doc. Pla. 97.) 21 H. 6. 16.

[288. a.] Sect. 501.

*ITEM, en appeale de robberie, ſi le defendant voile pleader un releaſe de l'appellant de touts actions perſonals, ceo ſemble nul plee; car action de l'appeale, lou l'appellee aura judgement de mort, &c. eſt pluis hault que action perſonul eſt, et n'eſt pas proprement dit action perſonal: et pur ceo ſi le defendant voiloit plead un releaſe del appellant de barrer luy d'appeale, en ceſt caſe il covient d'aver un releaſe de touts manners * d'appeals, ou touts manners d'actions, come il ſemble, &c.*

ALSO, in an appeale of robberie, if the defendant will plead a releaſe of the appellant of all actions perſonals, this ſeemeth no plea; for an action of appeal where the appellee ſhall have judgment of death, &c. is higher than an action perſonall is, and is not properly called an action perſonall: and there if the defendant will plead a releaſe of the appellant to barre him of the appeale, in this caſe hee muſt have a releaſe of all manner of appeales, or all manner of actions, as it ſeemeth, &c.

"*ROBBERIE.*" *Roberia*, properly is when there is a felonious taking away of a man's goods from his perſon: and it is called robbery, becauſe the goods are taken as it were *de la robe*, from 22 Aſſ. 39.

* *d'avoir* added L. and M.

W. 1. cap. 29. from the robe, that is, from the person; but sometimes it is taken in a larger sense.

(3 Inst. 68. Dy. 39. a. Cro. Car. 331.) "*Judgement de mort, &c.*" By this (&c.) is implyed appeales of rape, of arson or burning, of felony or larceny, for therein also is judgment of death, and are within our author's reason.

V. Sect. 508. (Post. 291. b.) "*Come il semble, &c.*" It is to be understood, that, first, a release of all actions criminall, mortall, or concerning pleas of the crowne; secondly, a release of all actions generally; thirdly, a release of all appeales; and lastly, a release of all demands, are good barres in all these kinds of appeales.

Sect. 502.

MES en appeale de maihem un release de touts manners d'actions personals est bone plee en barre, pur ceo que en tiel action il ne recovera forsque damages, &c.

BUT in appeale of mayhem a release of all manner of actions personals is a good plea in barre, for that in such an action hee shall recover nothing but damages.

Mir. ca. 1. §. 9. Glan. li. 14. ca. 7. Bract. lib. 3. Tract. 2. ca. 24. Brit. fo. 48. ca. 25. Flet. lib. 1. ca. 38. Stanf. Pl. Cor. fo. 38. b. (3 Inst. 118. 4 Rep. 43. 45. Aut. 126.) 28 E. 3. 94. 8 H. 4. 24.

"MAYHEM," *maihemium, membri mutilatio, or obtruncatio*, commeth of the French word *mehaigne*, and signifieth a corporall hurt, whereby hee loseth a member, by reason whereof hee is lesse able to fight; as by putting out his eye, beating out his foreteeth, breaking his skull, striking off his arme, hand, or finger, cutting off his legge or foot, or whereby he loseth the use of any of his said members.

"*Damages, &c.*" Vide Sect. 194.

21 H. 6. 16. (Aut. 127. a. 9 Rep. 52.) "*Release de touts manners actions personals est bone plee, &c.*" And the reason is, for that every action wherein damages only are recovered by the plaintife, is in law taken for an action personall.

Sect. 503. [288. b.]

ITEM, si home soit utlage en action personal per proces sur le original, et port breve d'error, si celuy a que suit il fuit utlage, voile pleader envers luy un releas de touts manners d'actions personals, ceo semble nul plee; car per le dit action il ne recovera rien en personaltie forsque tantsolement de reverser le utlagarie: mes un release de briefe d'error est bone plea.

ALSO, if a man bee outlawed in an action personall by processe upon the originall, and bringeth a writ of errour, if hee at whose suit he was outlawed will pleade against him a release of all manner of actions personals, this seemeth no plea; for by the said action hee shall recover nothing in the personaltie, but only to reverse the outlawrie: but a release of the writ of errour is a good plea.

"*BRIEFE*

"BRIEFE *de errore*." This writ lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called *breve de errore corrigendo*. But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si judicium redditum sit*: and that judgement must regularly be given by judges of record, and in a court of record, and not by any other inferiour judges in base courts, for thereupon a writ of false judgment doth lye. In this case of outlawry upon proceſſe, the judgement is given (in the county court, which is no court of record) by the coroners (saving in London judgement is given by the recorder, and not by the maior, who is coroner by the custome of the city): for after the defendant is *quinto exactus*, and maketh default, the judgement is, *ideo utlagetur per judicium coronatorum*; and in London, *per judicium recordatoris*: so as by the outlawry the plaintife recovers nothing, but the king taketh the whole benefit thereof; for the law did intend, that the defendant would rather appeare and answer the plaintife, &c. than to forfeit all his goods and chattels, debts and duties to the king, by his default and contumacie. But *Littleton* is to be intended, that the sheriffe doe returne the *exigent* whereby the outlawry appeares of record, or that the outlawry be removed by *certiorari*, for before that time that the outlawry appeare of record, the defendant doth not forfeit his goods, nor the plaintife can be disabled, nor any writ of error doth lye in that case. And this is the cause that the goods of outlawes cannot be claimed by prescription, because they are not forfeited, untill the outlawry appeare of record. *Vide Sect.* 197. where it appeareth by *Littleton*, that the plaintife cannot be disabled by outlawry, unlesse it appeareth of record.

V. fl. 11. fo. 39. 41. in Metcalfe's case upon what judgements and awards a writ of error doth lie. (Cro. Car. 66.) (3 Rep. 1. Cro. Jac. 5.) 11. 9. fo. 111. Foxley's case. Li. 7. fo. 11, 18. Gentleman's case (Cro. Car. 83. Noy 68. 1 Roll. 750. 11 Rep. 38. F. N. B. 17. Ant 117. b. 8 Rep. 141.) 13 Eliz. Dyer 317. (Ant. 128. b.) Lib. 9. fol. 119. 8 Jenkin's case. (5 Rep. 111.) (Ant. 144.) 28 Ass. 49. 12 H. 3. Utlag. 3. 38 E. 3. 15. Mich. 4 & 5 El. Dyer, fo. 222. Vid. Sect. 197. (6 Rep. 25. F. N. B. 20. b. 21. b.)

"*Car per le dit action il recovera rien en le personaltie.*" Hereupon is to be observed a diversity, when by the writ of error the plaintife shall recover, or be restored to any personall thing, as debt, damage, or the like; for then by the reason that *Littleton* here yeeldeth, the release of all actions personals is a good plea, for that the plaintife is to recover, or to be restored to something in the personalty. And in likewise, when land is to be recovered, or to be restored in a writ of error, a release of all actions reals is a good barre. But where by a writ of error the plaintife shall not bee restored to any personall or reall thing, then a release of all actions reall or personall is no barre; and therefore *Littleton* here putteth the case with great caution. If a man (saith he) by proceſſe upon the originall be outlawed, there in deed he shall be restored to nothing in the personalty against the plaintife. But where by the outlawry he forfeited all his goods and chattels to the king, he shall be restored to them; also thereby he shall be restored to the land, and to be of ability to sue, &c. But if the plaintife, in a personall action, recover any debt, &c. or damages, and bee outlawed after judgement, there in a writ of error brought by the defendant upon the principall judgement, a release of all actions personals is a good plea. And so it is where a judgement is given in a reall action, a release of all actions reals is a good barre in a writ of error brought thereupon.

1 H. 4. 6. (1 H. 4. 6. 8 Rep. 152. 156. 8 H. 6. c. 12. 32 H. 8. 30. 18 Eliz. 14. Cro. Car. 272. 878. 5 Rep. 41, 42.)

If the tenant in a reall action release to the demandant after recovery his right in the land, he shall not have a writ of error, for that he cannot be restored to the land. 9 H. 6. 47.

And so it is if debt, &c. or dammages be recovered in a personall action by false verdict, and the defendant bringeth a writ of attaint, a [a] releasse of all actions personal is a good barre of the attaint; for thereby the plaintife is to be restored to the debt, &c. or damages which he lost: the like law is if a judgement be given upon a false verdict in a reall action, a releasse of all actions real is a good barre in an attaint. For both the writ of error and the writ of attaint doe insue the nature of the former action, &c.

[a] 22 H. 6. 3. b. 13 E. 4. 1. 8.

34 H. 6. 31.
35 H. 6. 19.
29 Ass. 35.
47 E. 3. 6.
20 E. 3. 37.
(5 Rep. 86.)

And so it is if a writ of *audita querela* be brought by the defendant in the former action to discharge himselfe of an execution, a releasse of all actions personal is a good barre, because he is to discharge himselfe of a personall execution.

(6 Rep. 25.)

"*Mes un releasse de briefe de error est bone plea, &c.*" So as in this speciall case here put by *Littleton*, wherein the plaintife is to recover or be restored to nothing against the party; yet for that the plaintife in the former action is privy to the record, a releasse of a writ of error to him is sufficient to barre the plaintife in the writ of error of the suit, and vexation by the writ of error. And so note that an action reall or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ (1) implyeth neither of them, which is worthy of observation.

Sect. 504.

ITEM, si home recovera debt ou damages, et il releſſa al defendant touts maners d'actions, ancore il puit loialment ſuer execution per capias ad ſatisfaciendum, *ou per* elegit, *ou* fieri facias: *car execution per tiel briefe ne poit eſtre dit action.*

ALSO, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet hee may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias:* for execution upon such a writ cannot bee said an action.

Vide Sect. 233. (5 Rep. 89, 89. 8 Rep. 153. a.)
8 E. 3. 9.
4 E. 3. Attorney 18.
33 H. 6. 49.
34 H. 6. 51.
[b] 13 H. 4. Releasse 53.
19 H. 6. 3.
26 H. 6. Execution 7.

HERE appeareth a diversity betweene an action and an execution. For regularly an action is said in its proper sense to continue until judgement bee given, and after judgement then doth processe of execution begin; and therefore a releasse of all actions regularly is [b] no barre of execution, for the execution doth beginne when the action doth end. And therefore the foundation of the first is an originall writ, and doth determine by the judgement; and writs of execution are called judiciall, because they are grounded upon the judgement.

Sir William Herbert's case, lib. 3. fo. 11, 12.

"*Per cap. ad ſatisfaciendum.*" This is a judiciall writ for the taking of the body in execution untill hee hath made satisfaction: where a *capias ad satisfaciendum* lyeth at the common law; and where it is given by statute you may reade at large in my Reports.

I have read two ancient records touching the taking of the body in execution, whereof, to my remembrance, I never read any touch

(1) That is, a writ of error.

touch in our bookes, yet will I recite them, and leave them to the judicious reader. *William de Walton* brought an action of treſpaſſe of breaking his cloſe against *John Martin*, and upon not guilty pleaded, hee was found guilty and damages aſſeſſed; whereupon judgement was given that the plaintife ſhould recover his damages, *et quod prædictus Johannes capiatur.* And the record ſaith, *Quod prædictus Johannes venit coram domino rege et reddidit ſe priſonæ, et quia conſtat curiæ per inſpectionem corporis ipſius Johannis, quòd idem Johannes eſt talis ætatis quòd pœnam impriſonamenti ſubire non poteſt, ideo dictum eſt ei, quod eat inde ſine die.* The other record is, That *Ellen Allot* brought an appeale of robbery againſt *John Boſkiſteleke* clerke, *Richard Charta*, and others, who pleaded not guilty, and were not found guilty: whereupon judgement was given that they ſhould goe quite, *et prædicta Elena pro falſo appello ſuo committatur priſonæ, &c.* (for [b] by the ſtatute ſhe ought to be impriſoned in that caſe for a yeare. But the record ſaith, *Quia eadem Elena preguans fuit, et in periculo mortis, ipſa dimittitur per manucaptionem, &c. ad habendum corpus uſque quind. Michaelis, &c.*(2).

Paſch. 14 E. 3. Rot. 106. coram Rege in Banco. Suſſex. (Cro. Jac. 356.)

Mich. 41 E. 3. Rot. 27. coram Rege Carnib. in Theſaur.

[b] W. 2. cap. 12. (Siderf. 236. Hutton 118.)

[280 b.] There be certaine maximes in the law concerning executions, as taking ſome inſtead of many. *Ea quæ in curiâ noſtrâ rite acta ſunt, debitæ executioni demandari debent. Parum eſt latam eſſe ſententiam niſi mandetur executioni. Executio juris non habet injuriam. Executio eſt fructus et finis legis. Juris effectus in executione conſiſtit. Proſecutio legis eſt gravis vexatio, executio legis coronat opus. Boni judicis eſt judicium ſine dilatione mandare executioni. Favorabiliores ſunt executiones aliis proceſſibus quibuſcunque.* But now let us heare what *Littleton* ſaith.

"*Per elegit.*" This is alſo a judiciall writ, and is given by the ſtatute eyther upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, for that according to the ſtatute that ſaith, [c] *Sit de cætero in electione illius, &c. ſequi breve quòd vicecomes fieri faciat, &c. vel quòd liberet ei, &c.* The words of the writ bee, *Elegit ſibi liberari, &c.* And thereupon it is called an *elegit*. By this writ the ſherife ſhall deliver to the plaintife *omnia catalla debitoris* (*exceptis bobus & aſris carucæ*) *et medietatem terræ.* And this muſt be done by an inqueſt to bee taken by the ſherife.

(5 Rep. 88. b.)

[c] W. 2. cap. 18. (Plowd. 178. b.)

When *Littleton* wrote, by force of certaine acts [d] of parliament, execution might bee had of lands (beſides by force of the *elegit*) upon ſtatutes merchant, ſtatutes ſtaple, and recognizances taken in ſome court of record; and ſince he wrote, upon a recognizance or bond taken by force of the ſtatute [*] of 23 *H.* 8. before one of the chief juſtices, or the maior of the ſtaple, and recorder of London out of terme, which hath the effect of a ſtatute ſtaple. The manner of the executions upon body, lands, and goods, appeareth in the ſtatutes quoted in the margent.

[d] 11 E. 1. Stat. de Acton Burnell. 13 E. 1. de mercatoribus 27 E. 3. cap. 22. Vide Fleta, li. 2. cap. 57. 25 E. 3. 55. (6 Rep. 44.)

[*] 23 H. 8. cap. 6.

Since *Littleton* wrote, a profitable ſtatute hath been made [e] concerning executions of lands, tenements, and hereditaments, whereby it is provided, that if after ſuch lands, &c. be had and delivered in execution upon a juſt or lawfull title, wherewithall the ſaid lands, &c. were liable, tied, or bound at ſuch time, as they were delivered or

[e] 32 H. 8. cap. 5. (5 Rep. 86. b. 2 Inſt. 677.)

(2) The record at large is ſtated in 12 Rep. fol. 126.

or taken into execution, shall be recovered, devested, taken, or evicted out of, or from the possession of any such person, &c. before such times, as the said tenants by execution, their executors or assignes, shall have fully levied their debt and damages, for the which the said lands, &c. were taken in execution; then every such recoveror, obligee, and recognisee, shall have a *scire facias* out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heires, executors or assignes, to have execution of other lands, &c. liable and to be taken in execution for the residue of the debt or damages. *Sed opus est interprete.*

Lib. 4. fol. 66. Fulwood's case.

Therefore, first, it is to be knowne, that where the tenant by execution hath remedy given to him by law after eviction, there the statute extendeth not to it; for the act saith, by reason whereof the said recoverors, obligees, and recognizees, have been clearly set without remedy, &c. and the body referreth to the preamble, and the party ought not to have double satisfaction, one by the former lawes, and another by this statute.

(Cro. 338.)

And therefore if part of the land, &c. be evicted from the tenant by execution, this statute extendeth not to it; because he should hold the residue, till he be fully satisfied, and he must be contented if all be evicted saving one acre to hold that, though it be but a poore remedy: for no new execution in that case hee can have upon this statute. Therefore if the conusee hath remedy *in praesenti* for part, or *in futuro* for all, or part, this statute extendeth not to it.

14 Rep. 81. 2 Inst. 678.)

Secondly, if a man be bound to *A.* in a statute of a thousand pounds, and by a latter statute to *B.* in a hundred pounds, and *B.* first extendeth, and then *A.* extendeth and taketh the land from *B.* yet *B.* shall have no aide of the statute, because after the extent of *A.* *B.* shall re-enjoy the land, by force of his former execution.

Thirdly, If the wife of the conusee recover dower against the tenant by execution, he shall hold over, and shall have no aide of this statute.

Fourthly, If a man put out his lessee for yeares, or disseise his lessee for life, and after knowledge a statute and execution is sued against him, and the lessees reenter, the tenant by execution after the leases ended, shall hold over, and have no aide of this statute.

Fifthly, This statute must not be taken literally, but according to the meaning; therefore where the letter is untill he, &c. or his assignes shall fully and wholly have levied the whole debt or damages; if he hath assigned severall parcels to severall assignes, yet all they shall have the land but till the whole debt be paid.

Sixthly, where the words be, for the which the said lands, &c. were delivered in execution. A disseisor conveys lands to the king, who granteth the same over to *A.* and his heires to hold by fealty, and twenty pound rent, and after granteth the seigniory to *B.* *B.* knowledgeth a statute, and execution is sued of the seigniory. *A.* dieth without heire, and the conusee entereth, [200. a.] and is evicted by the disseisee; he shall have the aide of this statute; and yet it is out of the letter of the law, for the seigniory was delivered in execution and not the tenancy; but he was tenant by execution of those lands, and therefore within the statute. But the perquisite of a villeine being evicted is out of the statute, for he is tenant in fee simple thereof, and not tenant by execution.

Seventhly, Where the words be (delivered and taken in execution), yet if after the *liberate*, the conusee entereth (as he may) so as the

the land is never delivered, yet he is within the remedy of this ſtatute, for he is tenant by execution.

Eighthly, Where the ſtatute ſaith, then every ſuch recoveror, obligee, and recognizee ſhall, &c. and ſaith not, their executors, adminiſtrators, or aſſignes, but they are omitted in this materiall place, yet by a benigne interpretation this ſtatute ſhall extend to them, becauſe they are mentioned in the next precedent clauſe of the eviction, and the remedy muſt by conſtruction be extended to all the perſons that appeare by the act to be grieved; a point worthy the obſervation. (Ant. 268. b.)

Ninthly, Where the ſtatute giveth a *ſcire fac'* out of the ſame court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted ſhall have a *ſcire fac'* by the equity of this ſtatute out of that court, becauſe the *ſcire fac'* muſt be grounded upon the record. *Et ſic de ſimilibus.* (F.N.B. 265. d.)

Tenthly, Where the ſtatute giveth the *ſcire fac'* againſt ſuch perſon or perſons, &c. that were parties to the firſt execution, their heires, executors or aſſignes, &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor, &c. ſo as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *ſcire fac'* ſhall be awarded againſt him, his heires, executors, or aſſignes. But if he hath other lands ſubject to the execution, then a *ſcire fac'* lyeth againſt him or his aſſignes, but not againſt his executors; neither in that caſe can he have a *ſcire fac'* upon this ſtatute againſt the firſt debtor or recogniſor, becauſe it giveth it onely againſt him, &c. that was party to the firſt execution, his heires, executors, or aſſignes. But if there be ſeverall aſſignes of ſeverall parcels of Lands ſubject to the execution, one *ſcire fac'* upon this ſtatute ſhall lye againſt all the aſſignes. *Sed et modus in rebus.* This little taſte ſhall give a light to the diligent reader, not only to ſee into the ſecrets of this ſtatute, but to others alſo of like nature.

And by the ſtatute of 23 *H.* 8. *cap.* 6. it is provided, that the obligee, &c. ſhall have in every point againſt ſuch recogniſor, &c. like proces, execution, commodity and advantage in every behalfe, as hath been had or made upon the ſtatute ſtaple, and under ſuch maner and forme, as is for the ſame ſtatute ſtaple provided; by force of which branch, if the tenant by execution by force of the act of 23 *H.* 8. be evicted, he ſhall have the remedy provided for tenants by execution upon a ſtatute ſtaple by the act of 32 *H.* 8. In like maner by force of that clauſe of 23 *H.* 8. if the extendors upon a ſtatute ſtaple, &c. doe extend the lands, &c. at too high a rate, the obligee may pray that the extendors themſelves may take the lands, &c. at that rate, &c. by force of the ſaid ſtatutes of *Acton Burnel* and *De Mercatoribus*. Alſo no execution ſhall be ſued againſt the heire within age. 40 E. 3. 26. b. 44 E. 3. fol. 10. 2 H. 4. 17. 15 H. 7. 15.

But note, that upon a writ of *elegit* the plaintife cannot make any ſuch prayer, becauſe thoſe ancient ſtatutes doe extend to a ſtatute merchant, or a ſtatute ſtaple only, and neither to a recovery of debt or damages, nor to a recognizance in court; and ſo hath it been reſolved [*f*]. [*f*] Mich. 4 & 5. Ph. and Mar. Bendloes, by all the juſtices of the common pleas. (Plowd. 82. b. 205. b.)

Nota, it appeareth by the preamble of the ſaid act of 32 *H.* 8. and by divers [*g*] bookes, that after a full and perfect execution had [*g*] 15 E. 3. Extent. 7. 22 E. 3. Recovery in value 22.

31 E. 3. Extent. 13. 17 E. 3. 76. 15 E. 3. scire. fac. 115. 7 H. 4. 19. 22 Ass. 44. 22 E. 3. fol. ult. 44 E. 3. 10. 9 H. 7. 9. 15 H. 7. 15. 13 Eliz. Dier 299. 29 H. 8. Stat. Merchant Br. 40. (2 Cro. 15.)

had by extent returned and of record, there shall never be any re-extent upon any eviction; but if the extent be insufficient in law, there may goe out a new extent.

[k] 11 E. 3. Age 4. 15 E. 3. age 95. 24 E. 3. 28. 29 Ass. 37. 29 E. 3. 30. 47 Ass. 4. 47 E. 3. 7. Lib. 3. fol. 13. sir William Herbert's case. Brooke, age 33. (2 Cro. 333. 694. Siderf. 184.)

[k] If a man have a judgement given against him for debt or damages, or be bound in a recognizance, and dieth his heire within age, or having two daughters, and the one within age; no execution shall be sued of the lands by *elegit* during the minority, albeit the heire is not specially bound, but charged as *terre tenant* [i]; and so against an heire within age no execution shall be sued upon a statute merchant or staple, nor upon the obligation or recognizance upon the statute of 23 *H.* 8. for it is excepted in the proces against the heire. Neither if the heire within age indow his mother shall execution be sued against her during his minority (1).

[i] Temps E. 1. Ass. 402. 417. 16 H. 7. 6. Livre d'entr. 545. Brooke, age 33. (1 Cro. 295.)

[k] 27 E. 3. cap. 28.

Note, that by the statute [k] of 27 *E.* 3. the execution of lands upon a statute staple is referred to the statute merchant, and by the statute *De Mercatoribus* no execution shall be had against the heire so long as he is within age.

[l] 13 Eliz. cap. 5. Li. 3. fo. 80. &c. Twyne's case. Li. 5. fo. 60. Cooche's case. Lib. 6. fo. 18. Pakeman's case. Lib. 10. fo. 56. the Chanc. of Oxford's case. See the Statutes of 3 H. 7. cap. 4. & 50 E. 3. cap. 6. Mich. 12 & 13 Eliz. Dier 295. 18 Eliz. 351. Dier. (8 Rep. 132.)

Also since *Littleton* wrote, there is a right profitable statute [l] made against fraudulent feoffments, gifts, grants, &c. judgements and executions, as well of lands and tenements, as of goods and chattels, to delay, hinder, or defraud creditors and [290. b.] others of their just and lawfull actions, suites, debts, damages, penalties, forfeitures, heriots, mortuaries, and reliefes; for the exposition of which and other statutes, see the authorities quoted in the margent (1).

And it is to be observed, that the words of the said act of 13 *Eliz.* are, *Be it therefore declared, ordained, and enacted*; and therefore like cases in semblable mischiefe shall be taken within the remedy of this act, by reason of this word (*declared*); whereby it appeareth what the law was before the making of this act. But let us now returne to *Littleton*.

W. 2. cap. 18.

"*Fieri facias.*" This is a writ mentioned in the said statute, but is a writ of execution at the common law. And it is called a *fieri facias*, because the words of the writ directed to the sheriffe be, *quod fieri facias de bonis & catallis, &c.* and of those words the writ taketh its denomination.

But note, that a *capias ad satisfaciendum* is not mentioned in the said statute, because no *capias ad satisfac* did lye at the common law upon a judgement for debt, &c. or damages, but only when the originall action was *quare vi & armis, &c.* But latter statutes have given a *capias ad satisfac* where debt, &c. or damages are recovered; as it appeareth at large [m] in sir *William Herbert's* case, whereunto I referre the reader.

[m] Lib. 3. fol. 11. sir William Herbert's case. (Hob. 283.) (F. N. B. 164.)

And

(1) [See Note 248.] (1) [See Note 249.]

And it is to be observed, that these three writs of execution ought to be sued out within the yeare and the day after judgement; but if the plaintife sueth out any of them within the yeare, he may continue the same after the yeare untill he hath execution. And to none of these writs of executions the defendant can pleade; but if he hath any matter since the judgement to discharge him of execution, he may have an *audita querela*, and relieve himselfe that way, but pleade he cannot. As if the plaintife after release unto the defendant all executions, yet in none of these three writs he shall pleade it, but is driven to his *audita querela*, as hath been said.

Sect. 505.

MES si apres l'an et jour le plaintife voit suer un scire facias, * *a jacher si le defendant poit rien dire pur que le plaintife n'avera execution, donques il semble que tiel release de touts actions serra bone plee en barre. Mes aucuns ont semble contrary, entant que le briefe de* scire facias *est un briefe d'execution, et est d'aver execution, &c. Mes encore entient que sur mesme le briefe le defendant poit pleader divers matters puis le judgement rendue de ley ouster d'execution, come utlagary,* † *&c. et divers auters matters* ‡, *ceo bien poit estre dit action, &c.*

BUT if after the yeare and day the plaintife will sue a *scire facias*, to know if the defendant can say any thing why the plaintife should not have execution, then it seemeth that such release of all actions shall be a good plea in barre. But to some seemes the contrary, in as much as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgement given to oust him of execution, as outlawry, &c. and divers other matters, this may bee well said an action, &c.

"SCIRE *facias.*" This is a judiciall writ, and properly lyeth after the yeare and day after judgement given; and is so called, because the words of the writ to the sheriffe bee, *quod scire facias præfat' T.* (being the defendant) *quod sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c.* So as by the writ it appeareth, that the defendant is to be warned to plead any matter in barre of execution; and therefore albeit it be a judiciall writ, yet because the defendant may thereupon pleade, this *scire facias* is accounted in law to bee in nature of an action; and therefore [n] a release of all actions is a good barre of the same, and likewise a release of executions is a good barre in a *scire facias*. This writ was given in this case by the statute of W. 2. for at the common law if the plaintife had surceased to sue execution by *fieri facias*, or *levari facias*, a yeare and a day, hee had been driven to his new originall.

(Cro. Car. 240. 255. 328.)

[n] 19 H. 6. 3. 18 E. 4. 7. (8 Rep. 152.) (Doc. Pla. 350.) (Cro. Jac. 364.) W. 2. ca. 45. 8 E. 3. 297, 298. 18 E. 3. 39. Lib. 3. fol. 12. by William Herbert's case. Plita li. 2. cap. 19.

[291. a]

"*Ceo bien poet estre dit action.*" Here is to be observed, that every writ whereunto the defendant may plead, be it originall or judiciall, is in law an action.

* *a jacher si le defendant poit rien dier pur que le plaintife n'avera—d'aver*, L. and M. and Roh.

† *&c.* not in L. and M. nor Roh.

‡ *et pur* added L. and M. and Roh.

Sect. 506.

ET jeo croy, que en un scire facias *hors d'un fine, un releas de touts manners d'actions est bon plee en barre.*

AND I take it that, in a *scire facias* upon a fine, a release of all manner of actions is a good plea in barre.

This upon that which hath been said, is evident of it selfe.

Sect. 507.

MES lou home recovera debt ou damages, et est accorde perenter eux que le plaintife † ne suera execution, donques il covient que le plaintife fait un releas a luy de touts maners d'executions ‡.

BUT where a man recovereth debt or damages, and it is agreed betweene them that the plaintife shall not sue execution, then it behoveth that the plaintife make a release to him of all manner of executions.

"*IL covient:*" Albeit *Littleton* here saith, hee ought or must, &c. yet there bee other words which will release an execution without expresse words of a release of execution.

19 H. 6. 4. 26 H. 6. Execution 7. Li. 8. fo. 153. Ed. Altham's case. Vid. Brooke, tit. Releases, 87.

As if a man release all suites, the execution is gone; for no man can have execution without prayer and suit, but the king only; and therefore if the king releaseth all suites, it is no barre of his execution, because in the king's case the judges ought to award execution *ex officio* without any suite; but a release of executions doth barre the king in that case. And so note a diversity between a release of all actions, and a release of all suites.

26 H. 6. tit. Execution 7.

So if the body of a man be taken in execution, and the plaintife releaseth all actions, yet shall he remaine in execution; but if he release all debts or duties, he is to be discharged of the execution, because the debt or duty it selfe is discharged.

20 Ass. p. 7. (6 Rep. 13. b.) (10 Rep. 47.)

In the same manner if execution be sued upon a recognizance by *elegit*, and the conusee by deed make a defeasance, that if the conusor doth such an act, that then the recognizance shall be voide; by this the execution is discharged.

26 H. 6. ubi supra.

So it is if judgement be given in an action of debt, and the body of the defendant is taken in execution by a *capias ad satisfaciendum*, and after the plaintife releaseth the judgement, by this the body shall be discharged of the execution.

If the plaintife after judgement release all demands, the execution is discharged, as shall appeare by that which next hereafter shall be said.

20 H. 6. 6. per Taster.

If *A.* be accountable to *B.* and *B.* releaseth him all his duties, this is no barre in an action of account, for duties extend to things certaine, and what shall fall out upon the account is incertaine; and albeit the Latine word is *debita*, yet duties doe extend to all things due

† *ne suera execution—sa territ ouste d'action*, L. and M. ‡ *&c.* added L. and M. and Roh.

due that is certaine, and therefore diſchargeth judgements in perſonall actions, and executions alſo.

[291. b.] Sect. 508.

*ITEM, ſi home releſſa a un auter touts manners * de demands, ceo eſt le plus meilor relenſe † a luy a que le releaſe eſt fait, ‡ que il poet aver, et plus urera a ſon avantage. Car per tiel releaſe de touts manners § de demands, touts maners d'actions reals, perſonals, et actions d'appeale, ſont ales et extincts, et touts manners d'executions ſont ales et extincts.*

ALSO, if a man releaſe to another all maner of demands, this is the beſt releaſe to him to whom the releaſe is made, that hee can have, and ſhall enure moſt to his advantage. For by ſuch releaſe of all manner of demands, all maner of actions reals, perſonals, and actions of appeale, are taken away and extinct, and all manner of executions are taken away and extinct.

" *TOUTS manners de demands.*" (5 Rep. 56. a.) (4 Co. Inſt. 323.) (Sid. 141.)

" *Demande,*" *Demandum*, is a word of art, and in the underſtanding of the common law is of ſo large an extent, as no other one word in the law is, unleſſe it be *clameum*, whereof *Littleton* maketh mention, *Sect.* 445. And here is to be obſerved, that there bee two kinde of demands or claimes, viz. a demand or claime in deed, and a demand or claime in law; or an expreſſe, and an implied demand or claime. *Littleton* here putteth examples of both: and firſt he ſpeaketh of reall actions, wherein hee that bringeth his action maketh his demand, and therefore hee is properly called a demandant; and hee that defendeth is called tenant, becauſe hee is tenant of the freehold of the land. Lit. Sect. 444. Bract. li. 1. cap. 10. Pl. Com. Steill's caſe. 359. &c. (8 Rep. Altham's caſe, fol. 151.)

Of demands implied, or in law, *Littleton* putteth examples: Firſt, of all actions perſonals: ſecondly, of appeales; for in both thoſe caſes he that bringeth the ſuit is called plaintife, and not demandant, and he that defendeth is called defendant. Thirdly, of executions. Fourthly, of title or right of entry, eyther by force of a condition, or by any former right, which meerely is a demand or claime in law; but otherwiſe it is in the king's caſe. Fifthly, of a rent ſervice, rent charge, common of paſture, &c. which alſo are meere demands or claimes in law. (1) All which *Littleton* here, and in the two next Sections following, putteth but for examples; for by the releaſe of all demands, other things alſo be releaſed, as rents ſeck, all mixt actions, a warranty which is a covenant reall, and all other covenants reall and perſonall, eſtovers, all manner of commons and profits apprender, conditions before they be broken or performed, or after, annuities, recognizances, ſtatutes merchant or of the ſtaple, obligations, contracts, &c. are releaſed and diſcharged (2). (2 Cro. 487.) 38 H. 6. tit. Releaſ. Br. 9. 6 H. 7. 15. 19 H. 6. 3. 4. 20 Aſſ. Pl. 5. 40 E. 3. 22. 49 E. 3. 7. b. 50 Aſſ. Pl. 6. 14 H. 4. 8. 13 H. 2. tit. Avow. 89. Lib. 8. fo. 153. Ed. Altham's caſe. Lit. 170. Sect. 748. Dyer 5. El. 217. (Yelv. 214.) (Cro. Jac. 170, 171.) (10 Rep. 51. b.)

* *de* not in L. and M. nor Roh.
† *a luy—que celuy*, L. and M. and Roh.
‡ *que il*, not in L. and M. nor Roh.
§ *de* not in L. and M. nor Roh.

(1) [See Note 250.] (2) [See Note 251.]

(10 Rep. 47.)
(1 Lev. 99.)
(3 Lev. 274.)

Sect. 509.

ET ſi home ad title de entry en aſcuns terres ou tenements, per tiel releaſe ſon title eſt ale.

‖ Sed qnære de hoc; *car* Fitz-James *chiefe juſtice de Engleterre tient le contrary, pur ceo que entre ne poit properment eſtre dit demande,* P. 19 H. 8*.

AND if a man hath title of entry into any lands or tenements, by ſuch a releaſe his title is taken away.

Sed quære de hoc; for *Fitz-James* chiefe juſtice of England holdeth the contrary, becauſe an entrie cannot bee properly ſaid a demand.

34 H. 8. tit. Releaſ. B. 9. Chaunceÿ's caſe Lib. 8. fo. 155. Ed. Altham's caſe.

"*TITLE.*" Here title is taken in the largeſt ſenſe, including right alſo. [202. a.]

* "Sed quære, &c." This is an addition, and no part of *Littleton*, and the opinion here cited cleerely againſt law.

Sect. 510.

ET ſi home ad rent ſervice ou rent charge, ou common de paſture, &c. per tiel releaſe de touts manners de demaunds fait al tenaunts de la terre dont le ſervice ou le rent eſt iſſuant, ou en † que le common eſt, le ſervice, le rent, et le common, eſt ale et extinct, &c.

AND if a man hath a rent ſervice or rent charge, or common of paſture, &c. by ſuch a releaſe of all manner of demands made to the tenants of the land out of which the ſervice or the rent is iſſuing, or in which the common is, the ſervice, the rent, and the common, is taken away and extinct, &c.

This upon that which hath been ſaid, needeth no further explication.

Sect. 511.

ITEM, ſi home releſſe a un auter touts manners de quarrels, ou touts controverſies ou debates enter eux, &c. quære, *a quel matter et a quel effect tiels parols ſoy extendont, &c.*

ALSO, if a man releaſeth to another all manner of quarrels, or all controverſies or debates between them, *quære* to what matter and to what effect ſuch words ſhall extend themſelves, &c.

40 E. 3. 47. b. Ed. Altham's caſe, ubi ſupra. 35 H. 8. Dier 57. 9 E. 4. 44.

"*QUARRELS, Querela, à querendo.* This properly concerneth perſonall actions, or mixt, at the higheſt; for the plaintife in them is called *querens*, and in moſt of the writs it is ſaid, *queritur.*

‖ This paragraph not in L. and M. nor Roh.

† *que—quelle terre*, L. and M. and Roh.

queritur. And yet if a man releaſe all *quereles* (a man's deed being taken moſt ſtrongly againſt himſelf) it is as beneficiall as all actions; for by it all actions, reall and perſonall, are releaſed. And by the releaſe of all quarrels, all cauſes of actions are releaſed thereby, albeit no action be then depending for the ſame. (9 Rep. 52.) 39 H. 6. 9.

"*Quarrels.*" Controverſies and debates are *ſynonima*, and of one ſignification. *Litis nomen omnem actionem ſignificat, ſive in rem, ſive in perſonam ſit.* If a man releaſe *omnes loquelas*, it is as large as *omnes actiones*; for *omnis actio eſt loquela*, and it extendeth as well to actions in courts of record, as baſe courts; for the writ of error ſaith, *in recordo et proceſſu, &c. loquelâ quæ fuit inter, &c.* And ſo the writ of falſe judgement ſaith, *recordari facias loquelam*, where the judgement was given in the county court. *Omnes exactiones* ſeeme to be large words; *exactio derivatur ab exigendo*, and *exigere* ſignifieth to enquire or demand. Lib. 8. fol. 153. Altham's caſe. 21 H. 6. 16. F. N. B. 23. 18. 50 Aſſ. 6. 40 E. 3. 22. 13 R. 2. Avowrie 89.

Sect. 512.

*ITEM, ſi home per ſon fait ſoit oblige a un auter en certaine ſumme de money, a payer al feaſt de S. Michael prochein enſuant, * ſi le obligee devant le dit feaſt releſſa al obligor touts actions, il ſerra barre del dutie a touts temps, et uncore il ne puiſſoit aver action al temps de releaſe fait.*

ALSO, if a man by his deede bee bound to another in a certaine ſumme of money, to pay at the feaſt of Saint *Michael* next enſuing, if the obligee before the ſaid feaſt releaſe to the obligor all actions, he ſhall be barred of the duety for ever, and yet hee could not have an action at the time of the releaſe made.

[292. b.] "*RELESSA al obligor touts actions, &c.*" The reaſon of this caſe is, for that the debt is a thing conſiſting meerely in action; and therefore albeit no action lyeth for the debt, becauſe it is *debitum in præſenti, quamvis ſit ſolvendum in futuro*, yet becauſe the right of action is in him, the releaſe of all actions is a diſcharge of the debt it ſelfe. [o] And ſo may an executor before probate releaſe an action; and yet before probate he can have no action, becauſe the right of the action is in him, and ſo it was adjudged. And ſome ſay, that an ordinary may releaſe an action, and yet he can have none. But if a man by deed doth covenant to build an houſe or make an eſtate, and before the covenant broken, the covenantee releaſeth to him all actions, ſuits, and quarrels, this doth not diſcharge the covenant it ſelfe, becauſe at the time of the releaſe *nihil fuit debitum*, there was no debt or duty, or cauſe of action in being. But in that caſe a releaſe of all covenants is a good diſcharge of the covenant before it be broken. (Dyer 307. a. Cro. Car. 426.) (2 Roll. 410. 412.) 11 H. 4. 41. 43. (9 Rep. 37, 38. 2 Inſt. 398.) [o] Trin. 2 Ja. in Com. Banco, inter Middleton & Rinnot. 18 H. 6. 23. b. Pl. Com. 277, 278. in Crefbroke's caſe per Weſton. 5 Eliz. Dier 217. Altham's caſe ubi ſupra. (10 Rep. 51. b. 1 Rep. 112. b. 2 Cro. 222. 571. Sid. 86. Hob. 218.)

* &c. added L. and M. and Roll.

Sect. 513.

MES si home lessa terre a un auter pur terme d'un an, rendant a luy al feast de S. Michael prochein ensuant 40s. et puis devant mesme le feast il releassa al lessee touts actis, uncore apres mesme le feast il avera act de debt pur non payment de les 40s. nient obstant le dit releas. Stude causam diversitatis *enter les deux cases.*

BUT if a man letteth land to another for a yeare, to yeeld to him at the feast of S. *Mich.* next insuing 40s. and afterwards before the same feast hee releaseth to the lessee all actions, yet after the same feast hee shall have an action of debt for the non-payment of the 40s. notwithstanding the said release. *Stude causam diversitatis* betweene these two cases.

3 H. 7. 3. a. (8 Rep. 153.) 45 E. 3. 8. 27 H. 6. 26. 23 H. 4. Avowrie 240. (Ant. 47. b. Yelv. 67. F. N. B. 131. a. Cro. Jac. 505.) 38 E. 3. 15. b. 47 E. 3. 24. 20 H. 2. Execution 137. 16 E. 2. fb. 138. 16 E. 3. Seire fac. 4. F. N. B. 207. 9 E. 3. 7. 15 Rep. 18.) 5 Mar. Action sur le case. Br. 104. 3 Mar. Dier 113. Lib. 4. fol. 94. Slade's case. Li. 5. fo. 81. b. Forde's case. 39 H. 6. 28. b. 5 E. 4. 45. 3 H. 4. 13. 12 H. 7. Release 29. (See Mo. 13. Bend. 57. Cro. Eliz. 807. Cro. Car. 241. Cro. El. 118. 2 Leo. 107. 2 Cro. 504. Cro. El. 776. 4 Rep. 93. Litt. Rep. 61. S. C. 2 Saund. 337. 3 Mod. 153. S. C. Salk. 65.)

"*RELEASE touts actions.*" This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not meerely in action, because it may be granted over. But the lessor before the day may acquite or release the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five several dates, he shall not have an action of debt before the last day be past: and so note a diversity betweene duties which touch the realty, and the meere personalty. But if a man be bound in a recognizance to pay a hundred pound at five severall dayes, presently after the first day of payment he shall have execution upon the recognizance for that summe, and shall not tarry till the last bee past, for that it is in the nature of severall judgements. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case doth lie, for they are severall in their nature. Lastly, note a diversity between debts and covenants, or promises.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not meerely in action, because it may be granted over.

Sect. 514. [293. a.]

ITEM, ou home voile suer briefe de droit, il covient que il counta del seisin de luy, ou de ses ancestors, et auxy que le seisin fuit en temps de mesme le roy,

ALSO, where a man will sue a writ of right, it behoveth that he counteth of the seisin of himselfe, or of his ancestors, and also that the seisin

roy, come il counta en ſon count. Car ceſt un ancient ley uſe, come appiert per le report d'un plee en le eire de Nottingham *, titulo Droit en Fitzherbert, cap. 26. *en tiel forme que enſuit: Johñ Barre port ſon briefe de droit envers Reynold de Aſſington, et demaund dix certaine tenements, &c.* † *ou le miſe eſt joyne en le bank, et originall et le proces fueront demandes devant juſtices errants, ou les parties viendront, et les* ‡ *12 chivalers fieront lour ſerement ſans challenge des parties, d'eſtre allowes, pur ceo que election fuit fait per aſſent des parties, ove les quater chivalers, et le ſerement fuit tiel: Que jeo verity dirre, &c. lequel* R. *de* A. *ad plus mere droit a tener les tenements que John Barre demanda vers luy per ſon briefe de droit, ou John de aver eux, ſicome il demaund, et pur rien dirra que le verity* ‖ *ne dirra, ſicome moy ayde Dieu, &c. ſans dire a lour eſcient. Et tiel ſerement ſerra fait en attaint, et en battaile, et en ley gager, car eux mittont chaſcun choſe a fine. Mes John Barre counta del ſeiſin d'un Raſe ſon anceſter en temps le roy Henry, et Reynolde jur le miſe joyne tendiſt demy mark pur le temps, &c. Et jur ceo* Herle, *juſtice, dit al grand aſſiſe, apres ceo que ils fueront charges ſur le mere droit, Vous gentes, Reynold donaſt demy marke al roy pur le temps,* ¶ *al entent que ſi* † *vous troves que l'aunceſter* ** *John ne fuit pas ſeiſie en le temps que le demaundant ad count,* †† *vous n'enquires plus avant del droit; et pur ceo vous nous dires, lequel l'auncester John, Raſe per noſme, fuit ſeiſie en temps le roy Henry, come il ad count, ou non. Et ſi vous troves que il ne fuit ſeiſie en cel temps, vous n'enquires nient pluis; et ſi vous troves*

ſeiſin was in the ſame king's time, as he pleadeth in his plea. For this is an ancient law uſed, as appeareth by the report of a plea in the eire of *Nottingham, tit. Droit in Fitzherbert, cap.* 26. in this forme following. *John Barre* brought his writ of right againſt *Reynold* of *Aſſington*, and demanded certaine lands, &c. where the miſe is joyned in banke, and the originall and the proceſſe were ſent before the juſtices errants, where the parties came, and the twelve knights were ſworne without challenge of the parties, to be allowed, becauſe that choiſe was made by aſſent of the parties, with the foure knights, and the oath was this: That I ſhall ſay the truth, &c. whether *R.* of *A.* hath more meere right to hold the tenements which *John Barre* demandeth againſt him by his writ of right, or *John* to have them, as hee demandeth, and for nothing to let to ſay the truth, ſo helpe mee God, &c. without ſaying to their knowledge. And the like oath ſhall bee made in an attaint, and in battaile, and in wager of law, for theſe doe bring every thing to an end. But *John Barre* counted of the ſeiſin of one *Raſſe* his anceſtor in the time of king *Henry*, and *Reynold* upon the miſe joyned tendred halfe a marke for the time, &c. And hereupon *Herle*, juſtice, ſaid to the grand aſſiſe after that they were charged upon the meere right, You good men, *Reynold* gave halfe a marke to the king for the time, to the intent that if you find that the anceſtor of *John* was not ſeiſed in the time that the demandant hath pleaded, you ſhall enquire no further upon the right; and for this, you ſhal tell us, whether the anceſtor of *John*

(*Raſſe*

* *titulo Droit en Fitzherbert, cap.* 26. not in L. and M. nor Roh.

† *ou* not in L. and M. nor Roh.

‡ 12 not in L. and M. nor Roh.

‖ *ne—jeo*, L. and M. and Roh.

¶ *al entent—et ceo ſert*, L. and M. and Roh. and in MSS.

† *vous—home*, L. and M. and Roh.

** *John* not in L. and M. nor Roh.

†† *vous—home*, L. and M. and Roh. and MSS.

troves que il fuit ſeiſie, donques enquires ouſter del briefe. Et puis le graund aſſiſe reviendroit ove lour verdict, et diſont, que Raſe† ne fuit pas ſeiſie en temps le roy H. per que fuit agard que Reynold tiendroit les tenements vers luy demandes, a luy et ſes heires quites de John Barre et ſes heires a remnant. Et John en le mercie, &c. Et le cauſe pur que jeo aye monſtre icy a toy, mon fits, ceſt plee, eſt, pur prover le matter precedent que eſt dit en briefe de droit, &c. car il ſemble per ceſt plee, que ſi Reinold n'avoit pas tendue demy marke pur enquirer del temps, &c. donques le graund aſſiſe duiſſoit eſtre charge tantſolement del mere droit, et nemy del poſſeſſion, &c. ‡ Et iſſint que touts foits en briefe de droit, ſi le poſſeſſion dont le demandant counta ſoit en temps le roy, come il avoit counte, donques le charge del grande aſſiſe ſerra tantſolement ſur le mere droit, coment que le poſſeſſion fuit encounter le ley, come il eſt dit adevant en ceſt chapter, &c.*

(*Ralfe* by name) were ſeiſed in king *Henries* time, as he hath pleaded, or not. And if you find that he was not ſeiſed in this time, you ſhall enquire no more; and if you find that he was ſeiſed, then you ſhall enquire further of the writ. And after the grand aſſiſe came in with their verdict, and ſaid, that *Ralfe* was not ſeiſed in the time of king *Henry*, whereby it was awarded that *Reynold* ſhould hold the tenements demanded againſt him, to him and his heires quite of *John Barre* and his heires to the remnant. And *John* in mercy, &c. And the reaſon why I have ſhewed to thee, my ſon, this plea, is, to prove the matter precedent which is ſaid in a writ of right; for it ſeemeth by this plea, that if *Reynold* had not tendered the halfe marke to enquire of the time, &c. then the grand aſſiſe ought to be charged onely to enquire of the meere right, and not of the poſſeſſion, &c. And ſo alwayes in a writ of right, if the poſſeſſion whereof the demandant counteth bee in the king's time, as hee hath pleaded, then the charge of the grand aſſiſe ſhall be only upon the meere right, although that the poſſeſſion were againſt the law, as it is ſaid before in this chapter, &c.

(Ant. 279. a.) For the time of limitation, ſee the ſtatute of 32 H. 8. cap. 2. Vide Sect. 170. (8 Rep. 65. Roh. 240.) F. N. B. 30. a. 2 E. 3. 27. Littl. 112. a.

"*IL covient que il counta del ſeiſin de luy ou de ſes auncеſtors.*" For if neyther hee nor any of his anceſtors were ſeiſed of the land, &c. within the time of limitation, he cannot maintaine a writ of right; for the ſeiſin of him of whom the demaundant himſelfe purchaſed the land, &c. availeth not.

And ſo it is in a writ of right of advowſon.

"*Auxy que le ſeiſin fuit en temps de meſme le roy come il counta.*" Hereby it appeareth, that not onely a ſeiſin (as hath beene ſaid) is requiſite, but alſo that the ſeiſin be had in the time of the ſame king, according to his count.

"*Report,*" commeth of the Latine word *Reportare, à re et porto, id eſt, referre, à re et fero.* And in the common law it ſignifieth a publike relation, or a bringing againe to memory caſes judicially argued, debated, reſolved, or adjudged in any of the king's courts of juſtice, together with ſuch cauſes and reaſons as were delivered by the judges of the ſame; and in this ſenſe *Littleton* uſeth the word in this place.

"*En*

* *briefe—droit*, L. and M. and Roh.
† *ne* not in L. and M. nor Roh.
‡ *Et* not in L. and M. nor Roh.

"*En le eire de Nottingham.*" *Eire, Iter.* And it ſignifieth the court of the juſtices in *eire*, and thereupon they were called *juſticiarii itinerantes*, in reſpect that the juſtices reſiding at Weſtminſter were called *juſtitiarii reſidentes*, and were much like in this reſpect to the juſtices of aſſiſe at this day, although for authority and manner of proceeding (whereof you ſhall reade [p] in the ancient authors of the law) farre different. And as the power of the juſtices of aſſiſes by many acts of parliament and other commiſſions increaſed, ſo theſe juſtices itinerant by little and little vaniſhed away. And it is certaine, that the authority of juſtices of aſſiſes itinerant through the whole realme, and the inſtitution of juſtices of peace in every county being duely performed, are the moſt excellent meanes for the preſervation of the king's peace, and quiet of the realme, of any other in the Chriſtian world. (4 Inſt. 184.)

[293. b.]

[p] Mirror, cap. 2. ſect. 3. and ſect. 15. and ca. 4. le office des Juſtices in Eire. Glanv. l. 9. cap. 11. Li. 8. cap. primo. Britt. fol. 1. b. 7, 8, &c. Bract. lib. 3. f. 113, &c.

Flet. li. 1. ca. 13, &c. 4 E. 3. 32. 6 E. 3. 55. 28 E. 3. 21. 15 H. 7. 5.
Vide Sect. 442. 238, 234.

"*De Nottingham.*" This ſhould bee *Northampton*, according to the originall.

This report whereof *Littleton* here maketh mention, you ſhall finde an abſtract of it in 3 *E.* 3. ſince *Littleton*'s time, put in print by *Fitzherbert* when he was ſerjant in 11 *H.* 8. and is not in the Reports or bookes at large. And yet here it appeareth, that they be of great authority, and vouched by *Littleton* himſelfe for the proofe of a maine point in law. And hereby it alſo appeareth how neceſſary it is to reade records and pleas reported or recorded, though they were never printed. For thoſe and the like records are *veritatis & vetuſtatis veſtigia.*

3 E. 3. tit. Droit. F. 26.

[294. a.]

"*Tit. droit* in Fitzherbert, 26." is of a new addition, and therefore though it bee true, yet not to bee allowed.

"*Et le original et le proces fuera demande devant juſtices itinerants.*" For it is to be underſtood that all pleas either in the realty or perſonalty that were begun ere and not determined before juſtices in eire, were adjourned by them into the court of common pleas.

4 E. 3. 41. Peverel's caſe. Mirror, Glanvil, Bracton, Britton, Fleta, } ubi ſupra.

"*Les 12 chivalers ſieront lour ſerement ſauns challenge, &c. pur ceo que l'election fuit fait per aſſent des parties ove les 4 chivalers.*"

Here are foure things to be obſerved.

First, that *omnis conſenſus tollit errorem*, and againſt his owne conſent he cannot challenge the twelve.

30 E. 1. tit. challenge 172. 21 E. 4. 77. 39 E. 3. 1. 44 E. 3. 6. 11 H. 6. 13. (Cro. El. 664.)

Secondly, that the foure knights electors of the grand aſſiſe are not to be challenged, for that in law they bee judges to that purpoſe, and judges or juſtices cannot bee challenged. And that is the reaſon that noblemen, that in caſe of high treaſon are to paſſe upon a peere of the realme, cannot be challenged, becauſe they are judges of the fact, and the *Magna Charta* ſaith, *per judicium parium ſuorum.*

4 E. 3. 13. Magna Charta, cap. 29.

Thirdly, that the twelve before any aſſent may be challenged before the foure knights electors, but after aſſent or return of the pannell before the juſtices, there ſhall be no challenge to the pannell nor to the polles.

39 E. 3. 2. 7 H. 4. 30.

Fourthly,

7 H. 4. 20. Fourthly, if there be not foure knights for electors in that county, the next to them in that county ſhall be taken; *ne curia regis deficeret in juſtitiâ exhibendâ.*

"Sauns dire a lour eſcient." And here it appeareth, that where the judgement is finall, there the oath of the grand aſſiſe or jury is abſolute, and not to their knowledge, as here in the writ of right, in the atteint, and in wager of law, for the judgement in every of theſe three is finall. [294. b.]

Vide Sect. 193. *"Le miſe eſt joyné."* *Miſe* is a word of art appropriated only to a writ of right, ſo called becauſe both parties have put themſelves upon the meere right to be tryed by grand aſſiſe or by battaile; ſo as that which in all other actions is called an iſſue, in a writ of right in that caſe is called a miſe. And in this ſenſe *Littleton* taketh it here. But in a writ of right if a collaterall point is to be tryed, there it is called an iſſue; and is derived of this word (*miſſum*), becauſe the whole cauſe is put upon this point. It is alſo taken for expences, as *miſæ & cuſtagia.* And ſometime it ſignifieth a cuſtomary grant to the king, or lords marchers of Wales by their tenants at their firſt comming to their lands.

Registrum.

33 H. 8. ca. 13. 3 E. 6. ca. 36.

10 E. 3. 20. 31 E. 3. droit 11. 22 E. 3. 17. 18 H. 3. droit 62. 33 E. 3. ib. 39. Lamb. explicat. verborum verbo Mancuſa.

"Tender di marke al roy." Maſter *Lambard* ſaith, that *mancuſa & marca Saxonicè Mancup. 7. Mearc' Nummus 30 valens denarios.* And this *mearc*, now called a marke, being an old Saxon word, is the cauſe that England moſt commonly reckoned by markes. *Libra Saxonicè* is a *pund, à pondo*, which is called ſo untill this day. *Solidus, qui apud nos eſt pars libræ vicefima, denarios per id temporis continebat quinque, nunc duodecim;* and *ſcilling* is a Saxon word, and with us uſed to this day. Pennye, *Saxonicè pennig, Latinè denarius;* but the value of theſe have not been alwayes one.

F. N. B. 31. c. 3. 1 E. 3. droit 15. 6 E. 3. ibid. 24. In a writ of right of advowſon brought by the king, the tenant ſhall not tender the *di*-marke, becauſe *nullum tempus occurrit regi*; and therefore the king ſhall alledge, that hee or his progenitor was ſeiſed, without ſhewing any time.

Mirror, ca. 1. § 17. ca. 3. de Attaint. ca. 5. § 1. Bract. fo. 288, 289, &c. 292. Brit. fol. 241. 245, 246, &c. Flet. li. 5. ca. 21. & 34. Forteſcue ca. 26. (3 Inſt. 163. 222.)

"En attaint." *Attincta* is a writ that lyeth where a falſe verdict in court of record upon an iſſue joyned by the parties is given. And of ancient writers it is called *breve de convictione;* and is derived of the participle *tinctus*, or *attinctus*, for that if the petty jury be attainted of a falſe oath, they are ſtained with perjury, and become infamous for ever; for the judgement at the common law in the attaint importeth eight great and grievous puniſhments. 1. *Quòd amittat liberam legem imperpetuum*, that is, he ſhall be ſo infamous as he ſhall never be received to be a witneſſe, or of any jury. 2. *Quòd foris faciant omnia bona & catalla ſua.* 3. *Quòd terræ et tenementa in manus domini regis capiantur.* 4. *Quòd uxores & liberi extra domus ſuas ejicerentur.* 5. *Quòd domus ſuæ proſtrentur.* 6. *Quòd arbores ſuæ extirpentur.* 7. *Quòd prata ſua arentur.* *Et* 8. *Quòd corpora ſua carceri mancipentur.* So odious is perjury in this caſe in the eye of the common law, and the ſeverity of this puniſhment is to this end, *ut pœna ad paucos, metus ad omnes perveniat;* for there is *miſericordia puniens*, and there is *crudelitas parcens.* And ſeeing all tryals of reall, perſonall, and mixt actions depend upon the

the oath of 12 men, prudens antiquity inflicted a ſtrange and ſevere puniſhment upon them, if they were attainted of perjury.

But ſince *Littleton* wrote, a ſtatute hath beene made in mitigation of the ſeverity of the common law, in caſe when the petite jury is attainted, and therefore it is taken by equity. For where the ſtatute ſaith, that the party grieved ſhall have an attaint againſt the party which ſhall have judgement upon the verdict, yet an attaint ſhall be maintained upon that ſtatute againſt the executors of the party. *Et ſic de ſimilibus.* [a] But ſee the ſtatutes and authorities quoted in the margent. Only I thought good to obſerve three things.

[a] 23 H. 8. ca. 3. 3 Eliz. Dyer. 201. 7 E. 6. ibidem 81. 5 Mar. ibidem 129. 7 Eliz. ibidem 235. 24 H. 8. Br. Attaint. 96. 4 Mar. ib. 127. 20 H. 7. 5. 42 E. 3. 25. F. N. B. 107. D. Mirror ca. 1, §3.

Firſt, that no attaint can be maintained upon this ſtatute but between party and party.

Secondly, that no conuſance can be granted upon any attaint, becauſe all attaints are to be taken either before the king in his bench, or before the juſtices of the common place, and in no other courts, &c.

Thirdly, conſider what pleas may bee pleaded in an attaint by force of this act, and what not.

ca. 3. § . ca. 5. § 1. Bracton lib. 3. 141. b. & fo. 320. 331. Glanvil. lib. 2. cap. 3, 4, 5. Lib. 8. ca. 9. Lib. 4. ca. 1. Brit. fo. 40. 42, 43. 81. 175, 190. Fleta lib. 1. ca. 32. & lib. 2. cap. 48.

"*En battaile*," *Duellum*, *monomachia*, and it ſignifieth in the common law a tryall by ſingle fight, by battaile or combate, *monomachia* (1). [b] And in the writ of right neither the tenant or demandant ſhall fight for themſelves, but finde a champion to fight for them: becauſe if either the demandant or tenant ſhould be ſlaine, no judgement could be given for the lands or tenements in queſtion. But in an appeale the defendant ſhall fight for himſelfe, and ſo ſhall the plaintife alſo; for there if the defendant be ſlaine, the plaintife hath the effect of his ſuite, that is, the death of the defendant; the order and ſolemnity wherof you may reade in our ancient and latter bookes. And this the law did inſtitute when the tenant failed of his witneſſes, or evidences, or other proofes; and the preſumption of law is, that God will give victory to him that hath right.

[b] 4 E. 3, 41. 17 E. 3. 19 H. 6. 35. 1 H. 4. 3. 30 E. 3. 20. 29 E. 3. 12. 13 H. 4. 4. Stan. 174. 178. 17 Eliz. Dyer, 9 E. 4. 35. 1 H. 6. 6. 3 H. 6. 55. Vid. li. 9. fo. 32. b. & 33. b. Mirror ca. 4. del office des juſtices, &c. Glanvil. li. 1. cap. 9. Lib. 8. cap. 8. Lib. 10. cap. 5. Bract. li. 3. tract. 2. ca. 37. & li. 5. fol. 410. Britton fol. 66. Fleta lib. 2. ca. 56. 63.

"*Ley gager*," *Vadiare legem*; and there is alſo *facere legem*, by making of his law. That is, to take an oath (for example) that hee oweth not the debt demanded of him upon a ſimple contract, nor any penny thereof. And it is called wager of law, becauſe of ancient time he put in ſurety to make his law at ſuch a day; [295. a.] and it is called making of his law, becauſe the law doth give ſuch a ſpeciall benefit to the defendant to barre the plaintife for ever in that caſe [r]. But he ought to bring with him eleven perſons of his neighbours that will avow upon their oath, that in their conſciences he ſaith truth, ſo as he himſelfe muſt bee ſworne *de fidelitate*, and the eleven *de credulitate*.

[r] Magna Carta, ca. 28. Bracton lib. 5. fol. 410. Fleta lib. 2. ca. 63. Diverſities des Courts. 38 H. 6. 8. (6 Rep. Slade's caſe, 93.)

And

(1) Upon this ſubject, ſee 3 Black. ch. 22. ſect. 5 and 6. and the notes to the 1ſt vol. of Dr. Robertſon's Hiſtory of Charles the Vth.—The reader will alſo find ſome curious and intereſting particulars upon this head, in *Pere le Brun, Traité de quelques pratiques ſuperſtitieuſes qui ont ſeduit le peuple, et embaraſſé les ſçavants*.

And wager of law lieth not when there is a ſpecialty, or deed to charge the defendant, but when it groweth by word, ſo as he may pay or ſatisfie the party in ſecret, whereof the defendant having no teſtimony of witneſſes may wage his law, and thereby the plaintife is perpetually barred, as *Littleton* here ſaith; for the law preſumeth that no man will forſweare himſelfe for any worldly thing; but mens conſciences doe grow ſo large (ſpecially in this caſe paſſing with impunity) as they chooſe rather to bring an action upon the caſe upon his promiſe, wherein (becauſe it is *treſpaſſe ſur le caſe*) hee cannot wage his law, than an action of debt.

38 H. 6. 32. A man outlawed or attainted in an attaint, or upon an inditement of conſpiracy, or of perjury, or otherwiſe, whereby he becomes infamous, ſhall not wage his law.

11 H. 6. 40. 15 E. 4. 2. (Cro. Eliz. 161.) A man under the age of 21 yeares ſhall not wage his law; but a feme covert, together with her huſband, ſhall wage her law.

32 H. 6. 24. 8 H. 5. Ley. 66. 35 H. 8. Ley. Br. 109. When the ſuite is for the king, or for his benefit, as in a *quo minus*, the defendant ſhall not wage his law.

26 E. 3. 63. b. 21 H. 6. 42. If an infant be plaintife, the defendant ſhall not wage his law. An alien ſhall wage his law in that language he can ſpeake.

44 E. 3. 32. 18 E. 3. 4. 24 E. 3. 39. (4 Rep. 95. b.) In no caſe where a contempt, treſpaſſe, deceit, or injury is ſuppoſed in the defendant, he ſhall wage his law, becauſe the law will not truſt him with an oath to diſcharge himſelfe in thoſe caſes; only in ſome caſes in dett, detinue, accompt, the defendant is allowed by law to wage his law.

15 E. 4. 16. 10 E. 4. 5. (3 Cro. 790. 919.) [d] 33 H. 6. 24. 13 H. 7. 3. a. 22 H. 6. 41. 1 H. 6. 1. b. 8 H. 6. 11. 18 H. 8. 3. 3 E. 3. 28. 11 H. 4. 54. 5 H. 5. 13. 21 H. 6. 30. 24 E. 3. Ley 68. 30 E. 3. 19. 9 E. 4. 1. 34 H. 8. Ley Gager. Br. 97. In an action of account againſt a receiver, upon a receipt of money by the hand of another perſon for account render (unleſſe it be by the hands of his wife, or of his commoigne) the defendant ſhall not wage his law, becauſe the receipt is the ground of the action, which lyeth not in privity betweene the plaintife and defendant, but in the notice of a third perſon, and ſuch a receipt is traverſable [d]. But in an action of debt upon an arbitrament, or in an action of detinue by the bailement of another's hand, the defendant ſhall wage his law, becauſe the *debet* and the *detinet* is the ground of thoſe actions, and the contract or bailement, though it be by another hand, is but the conveyance, and not traverſable. In an action of account againſt a bailife of a mannor, the defendant cannot wage his law, becauſe it foundeth in the realty. In an action of debt which concerns the realty, as for debt for a rent upon a leaſe for yeares, or an action of detinue for detaining an indenture of a leaſe for yeares, the defendant ſhall not wage his law, much leſſe for charters or deedes which concerne inheritance.

10 H. 6. 7. 1 H. 7. 25. 6 Eliz. Bendloes. In an action of debt for a fine or amerciament in a leete, the defendant ſhall not wage his law, becauſe the leete is a court of record; but in an action of debt for an amerciament in a court baron the defendant ſhall wage his law, for that it is no court of record.

9 H. 5. 3. 8 H. 6. 15. 22 H. 6. 35. 38 H. 6. 6. In debt upon an account, before auditors, the defendant ſhall not wage his law, and this by conſtruction of the ſtatute of *IV.* 2. *cap.* 11. which giveth them great authority, and faith, *coram auditoribus*, and therefore of an account before one auditor the law lyeth. So if the lord before auditors be found in ſurplufage, in an action of debt brought by the accomptant, the lord ſhall not wage his law by conſtruction alſo upon this ſtatute, as an incident riſing upon the account.

14 H. 6. 68. 38 H. 6. 6. 28 H. 6. 4. 19 H. 6. 20. 22 H. 6. 13. 39 H. 6. 18. In an action of debt by a gaoler againſt the priſoner for his victuals, the defendant ſhall not wage his law, for he cannot refuſe the

the priſoner, and ought not to ſuffer him to die for default of ſuſtenance; otherwiſe it is for tabling of a man at large.

In an action of debt brought by an attorney for his fees, the defendant ſhall not wage his law, becauſe he is compellable to be his attorney. 21 H. 6. 4.

And ſo if a ſervant be retained according to the ſtatute of labourers in an action of debt for his ſalary, his maſter ſhall not wage his law, becauſe he was compellable to ſerve; otherwiſe it is, if he be not retained according to the ſtatute (1). 38 H. 6. 22. 39 H. 6. 18.

Whereſoever a man is charged as executor or adminiſtrator, he ſhall not wage his law, for no man ſhall wage his law of another man's deed, but in caſe of a ſucceſſor of an abbot, for that the houſe never dyeth. 5 H. 6. 38. 1 H. 7. 25. 13 H. 7.

In debt upon a penalty given by ſtatute, the defendant ſhall not wage his law. There is another kinde of wager of law in a reall action, of *non ſummons*, but thereof *Littleton* ſpeaketh not. 10 H. 7. 18.

"*Et ſur ceo* Herle *juſtice dit, &c.*" Hereby it appeareth, that it is the office of the judges to inſtruct the grand aſſiſe or jury [295. b.] in points of law; for as the grand aſſiſe or other jurors are triers of the matters of fact, *ad queſtionem facti non reſpondent judices, ſic ad queſtionem juris non reſpondent juratores.* And accordingly the judge in this caſe directed the grand aſſiſe, viz. if they found that; &c.

"*Per que fuit agard.*" Here are two things to be obſerved. Firſt, the forme of a judgement finall. Secondly, that a judgement finall is to bee given in this particular caſe. For the forme of the finall judgement for the tenant is here expreſſed, that the tenant ſhall hold the tenements demanded againſt him, to him and his heirs quite of the demandant and his heires for ever, and the demandant in the mercy. *Quòd tenens teneat terram illam ſibi et hæredibus ſuis in pace verſus petentem, & hæredes ſuos in perpetuum.* Glanv. li. 12. cap. 1. &c. Bracton li. 5. fo. 328. Lib. 5. fol. 85. Penrin's caſe.

For the ſecond point, ſeeing the miſe is joyned upon the meer right, albeit the verdict of the grand aſſiſe be given upon another point, yet judgement finall ſhall be given. And ſo it is if the tenant after the miſe joyned make default, or confeſſe the action, or if the demandant be non-ſuite; and yet in none of theſe caſes they of the grand aſſiſe gave their verdict upon the meere right. 34 E. 3. Judgm. 256. adjudge accord. 13 H. 4. Judgm. 245. 10 H. 6. 8. 20 H. 6. 38. b. 21 H. 6. 34. b. 26 H. 8. 8. b. 1 Mar. Dy. 98. Li. 5. fo. 85. Penrin's caſe. F. N. B. 5. 11. 31.

"*Come eſt avantdit.*" Vid. Sect. 478.

(1) [See Note 252.]

Chap. 9. Of Confirmation. Sect. 515.

FAIT de confirmation eſt communement en tiel forme, ou a tiel effect: Noverint universi, &c. me A. de B. ratificâſſe, approbâſſe et confirmâſſe C. de D. ſtatum & poſſeſſionem, quos habeo, de, & in uno meſſuagio, &c. cum pertinentibus in F. &c.

A DEEDE of confirmation is commonly in this forme, or to this effect: *Know all men, &c. that I A. of B. have ratified, approved, and confirmed to C. of D. the eſtate and poſſeſſion which I have, of, and in one meſſuage, &c. with the appurtenances in F. &c.*

Bract. li. 2. fol. 32. b. & 58, 59. Brit. 235. * Lit. pag. ſequen. Bract. li. 2. 58.

HERE firſt our author ſhewes what a confirmation is:

"*Confirmation.*" *Confirmatio* commeth of the verbe * *confirmare, quod eſt firmum facere:* and therefore it is ſaid, that *confirmatio omnes ſupplet defectus, licèt id quod actum eſt ab initio, non valuit.* A confirmation is a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is encreaſed.

Bract. li. 2. fol. 27. 38 H. 6. 34. 37. Pl. Com. Count de Leiceſter's caſe. (3 Rep. 64. b.) 10 E. 2. Confirm. 24. 32 E. 3. 9. [c] Fleta lib. 3. cap. 14. & lib. 3. cap. 3.

A confirmation doth not ſtrengthen a voide eſtate: *Confirmatio eſt nulla ubi donum præcedens eſt invalidum, & ubi donatio nulla omnino nec valebit confirmatio:* for a confirmation may make a voidable or defeaſible eſtate good, but it cannot worke upon an eſtate that is voide in law. *Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei, vel juris unde fieri debet confirmatio, & eodem modo niſi ille cui confirmatio ſit, ſit in poſſeſſione.* And another ſaith, [c] *Confirmare eſt id quod prius infirmum fuit firmare. Et donationum alia incepta, & defectiva, & poſt tempus confirmata, confirmatio enim omnem ſupplet defectum, poterit enim eſſe in pendenti donec per ratihabitionem hæredis cùm ad ætatem perveneriț roboretur* (1).

44 Ass. 3.

"*Ratificâſſe.*" *Ratificare eſt ratum facere*, and is *æquipollent* to *confirmare*, which, as hath been ſaid, is *firmum facere.*

"*Approbâſſe*" commeth of *ad* and *probo*, which is to make perfect and good.

Li. 9. fo. 142. Beamond's caſe Flet. li. 3. cap. 14.

"*Confirmâſſe.*" Here it is to be obſerved, that there bee two kindes of confirmations, *viz.* confirmations expreſſe or in deed, whereof *Littleton* hath here put theſe three examples, and confirmations implied, or in law, whereof *Littleton* hereafter ſpeaketh in this chapter. *Quælibet confirmatio, aut eſt perficiens, creſcens, aut diminuens;* and of all theſe *Littleton* putteth examples in this chapter. And hereof *Fleta* ſaith, *carta autem de confirmatione eſt illa quæ alterius factum conſolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit* (2).

(1) [See Note 253.]

(2) See 9 Rep. 142. where ſir Edward Coke brings examples of theſe different operations of a confirmation.

[296 a.]

Sect. 516.

*ET en aſcun caſe un fait de confirmation eſt bone et available, lou en tiel caſe un fait de releaſe n'eſt paſſe bone ne available. Sicome jeo leſſa terre a un home pur terme de ſa vie, lequel leſſa meſme la terre a un auter pur terme de xl. ans, per force de quel il eſt ne poſſeſſion; ſi jeo per mon fait confirme l'eſtate del tenant a terme d'uns, et puis le tenant a terme de vie moruſt durant le terme des * ans, jeo ne puis enter en la terre durant le dit terme.*

AND in ſome caſe a deede of confirmation is good and available, where in the ſame caſe a deede of releaſe is not good nor availeable. As if I let land to a man for terme of his life, who letteth the ſame to another for terme of forty yeares, by force of which he is in poſſeſſion; if I by my deed confirme the eſtate of the tenant for yeares, and after the tenant for life dieth during the terme of yeares, I cannot enter into the land during the ſaid terme.

LITTLETON in this chapter putteth eight diverſities betweene a confirmation and a releaſe (1); and thereof for illuſtration here hee putteth two caſes in this and the next Section, which upon that which hath beene ſaid in the precedent chapters, is ſufficiently explained. Onely in both theſe caſes this is to bee obſerved, that where a confirmation ſhall enlarge an eſtate, there privity is required, as well as in the caſe of the releaſe, as by many examples which *Littleton* puts in this chapter appeareth. And note, here is the firſt caſe wherein a releaſe and a confirmation doe differ:

49 E. 3. 32.

(1 Roll. Abr. 482.)

9 H. 6. 22. tit. releaſe 44.

Leſſee for life made a leaſe for thirty yeares, and after the leſſor and leſſee for life made a leaſe for ſixty yeares to another, which leaſe for ſixty yeares the leſſor did firſt confirme, and after the leſſor confirmed the leaſe for thirty yeares, and after tenant for life dyed within the thirty yeares; and it was adjudged [*d*], that the leaſe for thirty yeares was determined by the death of leſſee for life, and that the leſſee for ſixty yeares might enter; for that albeit the leaſe for ſixty yeares was the latter in time, yet was it of greater force in law, for that the leſſor who had power to confirme which of them he would, did firſt confirme the ſecond leaſe.

(Cro. Car. 284. 1 Roll. Abr. 485, 500. Mo. 67. Dyer 218. b. Hob. 165. Poſt. 310. a.)

[*d*] Inter Unwel & Lodge, temp. Reg. Eliz. (Hob. 7.)

In this chapter is alſo to be obſerved eight caſes, wherein a releaſe and a confirmation have the like operation in law.

Sect. 517.

UNCORE ſi jeo per mon fait de releaſe avoy releas al tenant a terme d'ans en la vie le tenant a terme de

YET if I by my deed of releaſe had releaſed to the tenant for yeares in the lifetime of the tenant for

* *xl.* added L. M. and Roh.

(1) He alſo mentions eight inſtances in which they agree.

de vie, cel releaſe ſerra voyd, pur ceo que adonques ne fuit aſcun privity perenter † moy et le tenant a terme d'ans: car releaſe n'eſt available al tenant a terme d'ans, mes ſou eſt un privitie perenter luy et celuy que releaſaſt.

for life, this releaſe ſhall be voide, for that then there was not any privity between me and the tenant for years: for a releaſe is not available to the tenant for yeares, but where there is a priyitie betweene him and him that releaſeth (2).

This belongeth to the firſt diverſity between a releaſe and a confirmation.

Sect. 518. [296. b.]

EN meſme le manner eſt, ſi jeo ſoy diſſeiſie, et le diſſeiſor fait un leaſe a un auter pur terme d'ans, ſi jeo releſſa al termor, ceo eſt voyde: mes ſi jeo confirma ‡ l'eſtate le termor, ceo eſt bone et effectual.

IN the ſame manner it is, if I be diſſeiſed, and the diſſeiſor make a leaſe to another for term of yeares, if I releaſe to the termor, this is void: but if I confirme the eſtate of the termor, this is good and effectuall.

HERE is the ſecond diverſitie betweene a releaſe and a confirmation. But if the diſſeiſor make a leaſe for yeares to begin at Michaelmaſſe, and the diſſeiſee confirme his eſtate, this is voide, becauſe he hath but *intereſſe termini*, and no eſtate in him, whereupon a confirmation may enure.

4 H. 7. 10. by Read.
22 E. 4. 36.

(5 Rep. 81.)

Sect. 519.

ITEM, ſi jeo ſoy diſſeiſie, et jeo confirma l'eſtate le diſſeiſor, il ad bone et droiturel eſtate en fee ſimple, coment que en le fait de confirmation nul mention eſt fait de ſes heires, pur ceo que il avoit fee ſimple al temps de confirmation. Car en tiel caſe ſi le diſſeiſee confirma l'eſtate le diſſeiſor, a aver et tener a luy et a ſes heires de ſon corps engendres, ou a aver et tener a luy pur le terme de ſa vie, uncore le diſſeiſor ad fee ſimple, et eſt ſeiſie en ſon demeſne come de fee, pur ceo que quant ſon eſtate fuit confirme, donque il avoit fee ſimple, et tiel fait ne poit changer ſon eſtate, ſans entry ‖ fait ſur luy, &c.

ALSO, if I be diſſeiſed, and I confirme the eſtate of the diſſeiſor, hee hath a good and rightfull eſtate in fee ſimple, albeit in the deede of confirmation no mention be made of his heires, becauſe hee had fee ſimple at the time of the confirmation. For in ſuch caſe if the diſſeiſee confirme the ſtate of the diſſeiſor, to have and to hold to him and his heires of his body engendred, or to have and to hold to him for term of his life, yet the diſſeiſor hath a fee ſimple, and is ſeiſed in his demeſne as of fee, becauſe when his eſtate was confirmed, he had then a fee ſimple, and ſuch deed cannot change his eſtate, without entry made upon him, &c.

HERE

† *moy et le tenant a terme d'ans,—luy et moy*, L. and M. and Roh.

‡ *l'eſtate de termor,—ſin eſtate*, L. and M. and Roh.

‖ *fait* not in L. and M. nor Roh.

(2) [See Note 254.]

HERE is the firſt caſe wherein the releaſe and confirmation doth agree, viz. a confirmation to a diſſeiſor in taile, or for any particular eſtate, is of the like force as a releaſe to a diſſeiſor, during ſuch eſtate, which in both caſes is good for ever. In the ſame manner it is, if the diſſeiſor make a gift in taile, and the diſſeiſee confirme the eſtate of the donee for the life of the donee, this confirmation enures to the whole eſtate taile; for a confirmation can make no fraction of any eſtate, to extend but to part of the eſtate only. *Et ſic de cæteris* (1).

19 H. 6. 22. 6 E. 3. Confirm. 4.

[297. a.]

Sect. 520.

EN meſme le manner eſt, ſi ſon eſtate ſoit confirme pur terme de un jour, ou pur terme d'un heure, il ad bon eſtate en fee ſimple, pur ceo que **ſon eſtate en fee ſimple fuits un foits confirme.* Quia confirmare idem eſt, quòd firmum facere, &c.

IN the ſame manner it is, if his eſtate bee confirmed for terme of a day, or for terme of an houre, hee hath a good eſtate in fee ſimple, for this, that his eſtate in fee ſimple was once confirmed. *Quia confirmare idem eſt, quòd firmum facere, &c.*

HERE is the ſecond caſe wherin the releaſe and confirmation doe agree. The reaſon of this is, for that the diſſeiſor hath a fee ſimple; and therefore if his eſtate be confirmed but for an houre, it is good for ever, becauſe (ſaith *Littleton*) *confirmare idem eſt, quòd firmum facere.*

Nota, a diverſity betweene a bare aſſent without any right or intereſt, and an aſſent coupled with a right or intereſt; and therefore an attornement cannot be made for a time nor upon condition; but if the perſon make a leaſe for a hundred yeares, the patron and the ordinary may confirme fifty of the yeares, for they have an intereſt, and may charge in time of vacation. And ſo if a diſſeiſor make a leaſe for an hundred yeares, the diſſeiſee may confirme parcel of thoſe yeares; but then it muſt be by apt words, for he muſt not confirme the leaſe, or demiſe, or the eſtate of the leſſee, for then the addition for parcell of the terme ſhould be repugnant when the whole was confirmed before, but the confirmation muſt be of the land for part of the terme. So may the confirmation be of part of the land; as if it be of forty acres, he may confirme twenty, &c. So if tenant for life make a leaſe for an hundred yeares, the leſſor may confirme eyther for part of the terme, or for part of the land. But an eſtate of free-hold cannot bee confirmed for part of the eſtate, for that the eſtate is intire, and not ſeverall, as yeares be (1).

Lib. 5. fol. 81. Forde's caſe. (Ant. 274. a.) (Poſt. 300. b.)

(1 Roll. Abr. 412.)

* *ſon* not in L. and M. nor Roh.

(1) [See Note 255.]

(1) [See Note 256.]

Sect. 521.

*ITEM, ſi mon diſſeiſor fait un leas a terme de vie, le remainder ouſter en fee, ſi jeo releas ql tenant a terme de vie, ceo urera a celuy en le remainder. Mes ſi jeo confirme l'eſtate de le tenant a terme de vie, uncore apres ſon deceaſe jeo puis bien enter, pur ceo que * riens eſt confirme forſque l'eſtate le tenant a terme de vie, iſſint que apres ſon deceaſe, jeo puis enter. Mes quant jeo releſſa tout mon droit dl tenant a terme de vie, ceo urera a celuy en le remainder ou en le reverſion, pur ceo que tout mon droit eſt ale per tiel releas. Mes en ceſt cas, ſi le diſſeiſee confirme l'eſtate et le title celuy en le remainder ſans aſcun confirmation fait a tenant a terme de vie, le diſſeiſee ne poit enter ſur le tenant a terme de vie, pur ceo que le remainder eſt dependant ſur l'eſtate le tenant a terme de vie; et ſi ſon eſtate ſerroit defeate, le remainder ſerroit defeate per l'entrie le diſſeiſee, et ceo ne ſerra reaſon que il per ſon entre defeaterroit le remainder encounter ſon confirmation, &c.*

ALSO, if my diſſeiſor maketh a leaſe for life, the remainder over in fee, if I releaſe to the tenant for life, this ſhall enure to him in the remainder. But if I confirme the eſtate of the tenant for tearme of life, yet after his deceaſe I may well enter, becauſe nothing is confirmed but the eſtate of the tenant for life, ſo that after his deceaſe I may enter. But when I releaſe all my right to the tenant for life, this ſhall enure to him in the remainder or in the reverſion, becauſe all my right is gone by ſuch releaſe. But in this caſe, if the diſſeiſee confirme the eſtate and title of him in the remainder without any confirmation made to tenant for life, the diſſeiſee cannot enter upon the tenant for terme of life, for that the remainder is depending upon the ſtate for life; and if his eſtate ſhould be defeated, the remainder ſhould be defeated by the entry of the diſſeiſee, and it is no reaſon that he by his entry ſhould defeat the remainder againſt his confirmation, &c.

HERE is the third caſe wherein the releaſe and confirmation differ, for the confirmation to the tenant for life doth not enure to him in the remainder.

And ſo it is when the ſeverall eſtates be in one perſon; as if the diſſeiſor make a gift in taile, the remaynder to the right heires of tenant in taile, if the diſſeiſee confirme the eſtate in taile, it ſhall not extend to the fee ſimple, no more than if the diſſeiſor had made a gift in taile, the remainder for life, the remainder to the right heires of tenant in taile; this extendeth onely to the eſtate taile, and not to the remainder for life, nor to the remainder in fee. But if the diſſeiſor make a leaſe for life to *A.* and *B.* and the diſſeiſee confirme the eſtate of *A.*, *B.* ſhall take advantage thereof; for the eſtate of *A.* which was confirmed was joynt with *B.* and in that caſe the diſſeiſee ſhall not enter into the land, and deveſt the moity of *B.*

(Ant. 52. a.) (Poſt. 310. a. 315. a. 319. a.) (1 Roll. Abr. 302.)

[297. b.]

(Sid. 83.) If the diſſeiſor infeoffs *A.* and *B.* and the heires of *B.* if the diſſeiſee confirme the eſtate of *B.* for his life, this ſhall not only extend to his companion, as hath beene ſaid, but to his whole fee ſimple,

* *nul* added L. and M. and Roh. — *et* not in L. and M. nor Roh.

ſimple, becauſe to many purpoſes hee had the whole fee ſimple in him, and the confirmation ſhall bee taken moſt ſtrong againſt him that made it. (1 Cro. 321.) (Ant. 182.)

Tenant in tayle diſcontinueth in fee and dyeth, the diſcontinuee make a leaſe for life, and granteth the reverſion to the iſſue, he ſhall not have a formedon againſt tenant for life; for by his formedon he muſt recover eſtate of inheritance, and the leſſee for life hath not the inheritance, but the iſſue in taile himſelfe hath it.

If feoffee upon condition make a leaſe for life, or a gift in taile, and the feoffor releaſe the condition to the feoffee, he ſhall not enter upon the leſſee or donee, becauſe he cannot regaine his ancient eſtate. (Ant. 202. a.)

If the feoffee upon condition make a leaſe for life, the remainder in fee, if the feoffor releaſe the condition to the leſſee for life, it ſhall enure to him in the remainder; as well as in the caſe of the right, or of a rent, &c.

If a feme diſſeiſoreſſe make a feoffment in fee to the uſe of *A.* for life, and after to the uſe of herſelfe in taile, and the remainder to the uſe of *B.* in fee, and then taketh huſband the diſſeiſee, and he releaſeth to *A.* all his right, this ſhall enure to *B.* and to his own wife alſo; for by the rule of *Littleton* it muſt enure to all in the remainder (1).

But if *A.* letteth to *B.* for life, and *B.* maketh a leaſe to *C.* for his life, the remainder to *A.* in fee, *A.* releaſeth to *C.* all his right, this is good to perfect the eſtate of *C.* for his life. But when *C.* dyeth, *A.* ſhall be in of his old eſtate, for his releaſe could not enure to himſelfe to perfect his defeaſible remainder, but his ancient right remaineth. And note, that in theſe two caſes the fee is deveſted and veſted all at one inſtant; in the ſame manner as if tenant in taile make a leaſe for life, at the ſame inſtant the eſtate taile is deveſted out of the donee, and the reverſion in fee out of the donor, and a new fee veſted in tenant in taile. And ſo if the huſband make a leaſe for life of his wife's land, he deveſteth his owne eſtate, that he hath in her right, and the inheritance of his wife, and at the ſame inſtant veſted a new reverſion in fee in himſelfe.

"Mes en ceſt caſe ſi le diſſeiſee confirme l'eſtate et title celuy en le remaynder." Here is the third caſe wherein the releaſe and confirmation doe agree, for the confirmation made to him in the remainder ſhall availe the tenant for life, as much as the releaſe ſhall. Vid. 29. Aſſ. 17. 30 H. 8. Recov. en value. Br. 30. 13 E. 3. entr. cong. Br. 197. Vid. Sect. 374.

[298. a.]

Pl. Com. Delamere's caſe.

"Pur ceo que le remainder eſt dependant, &c." By this ſome have gathered, that if a diſſeiſor make a leaſe for life, reſerving the reverſion to himſelfe, and the diſſeiſee confirmeth the ſtate of the diſſeiſor, that he may enter upon the leſſee, becauſe the eſtate of him in the reverſion dependeth not upon the ſtate for life as the remainder; but all is one, for by the confirmation made to him in the reverſion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoide the eſtate of the leſſee for life, but hee muſt avoide the ſtate of the leſſor, which againſt his owne confirmation he cannot doe; and it hath been adjudged, that if a diſſeiſor make a leaſe (Mo. 91.)

Reported by ſir John Popham, chiefe juſtice.

(1) [See Note 257.]

(Poſt. 302. a.) (6 Rep. 40.) (Sid. 360.) (1 Saun. 149, 150. Ant. 224. a.)

leaſe for life, and after levie a fine of the reverſion with proclamations, and the five years paſſe, ſo as the diſſeiſee is for the reverſion barred, he ſhall not enter upon the leſſee for life.

"*Le remainder ſerra defeat.*" It is regularly true, that when the particular eſtate is defeated, that the remainder thereby ſhall be alſo defeated, but it faileth in divers caſes.

Vid. Pl. Com. Colthirſt's caſe. (Poſt. 333. a. b.)

For where the particular eſtate and the remainder depend upon one title, there the defeating of the particular eſtate is a defeating of the remainder. But where the particular eſtate is defeaſible, and the remainder by good title, there though the particular eſtate be defeated, the remainder is good. As if the leſſor diſſeiſe *A.* leſſee for life, and make a leaſe to *B.* for the life of *A.* the remainder to *C.* in fee, albeit *A.* re-enter, and defeate the eſtate for life, yet the remainder to *C.* being once veſted by good title ſhall not be avoided; for it were againſt reaſon that the leſſor ſhould have the remainder againe, againſt his owne liverie; and this is well warranted by the reaſon of *Littleton* in this caſe. So it is if a leaſe be made to an infant for life, the remainder in fee, the infant at his full age diſagree to the eſtate for life, yet the remainder is good, for that it was once veſted by good title; for in both theſe caſes there was a particular eſtate at the time of the remainder created.

17 E. 3. 48.

If a leaſe be made to *A.* for the life of *B.* the remainder to *C.* in fee, *A.* dyeth before an occupant entreth, here is a remainder without a particular eſtate, and yet the remainder continueth good (1).

3 E. 3. Abb. Aſſ. (Plo. 35. a. Vaugh. 200. Moore 664. Yelv. 9. 2 Roll. Abr. 415. 7 H. 4. 6. 1 Rep. 66. Noy. 47.) 7 H. 4. 6.

A rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular eſtate continued not; for *eo inſtante* that he tooke the particular eſtate, *eo inſtante* the remainder veſted, and the ſuſpenſion in judgement of law grew after the taking of the particular eſtate (2).

If a man grant a rent to *B.* for the life of *Alice*, the remainder to the heires of the body of *Alice*, this is a good remainder, and yet it muſt veſt upon an inſtant (3).

Sect. 522.

*ITEM, ſi ſont deux diſſeiſors, et le diſſeiſee releſſa a un de eux, il tiendra ſon compagnion hors de la terre. Mes ſi le diſſeiſee confirma l'eſtate de l'un, ſans pluis * dire en le fait, aſcuns diont que il ne tiendra ſon compagnion dehors, mes tiendra joyntment ove luy, pur ceo que † riens fuit confirme forſque ſon eſtate que fuit joynt, &c.*

ALSO, if there bee two diſſeiſors, and the diſſeiſee releaſeth to one of them, hee ſhall hold his companion out of the land. But if the diſſeiſee confirme the eſtate of the one, without more ſaying in the deede, ſome ſay that hee ſhall not hold his companion out, but ſhall hold joyntly with him, for that nothing was confirmed but his eſtate, which was joynt, &c.

* *dire—parlance* L. and M. and Roh.

† *eut* added L. and M. and Roh.

(1) But ſince the ſtat. 29 Car. 2. c. 3. 14 Geo. 2. c. 20. no ſuch vacancy can happen.

(2) [See Note 258.]

(3) [See Note 259.]

THIS

THIS is the fourth caſe wherein the releaſe and the confirmation ſeeme to differ, being made unto one of the diſſeiſors.

"*Confirme forſque ſon eſtate, &c.*" Hereby it appeareth, that if the diſſeiſee confirme the eſtate of the one diſſeiſor in the lands, to have and to hold the lands or tenements, or the right of the diſſeiſee, to him and his heires, hee ſhall hold out the other diſſeiſor; and that appeareth by *Littleton*, firſt, upon theſe words *(confirme the ſtate of one)* without more ſaying in the deede, viz. to have and to hold the lands, &c. Secondly, the reaſon of *Littleton* in expreſſe words is, for that nothing was confirmed but his eſtate which was joynt. Thirdly, the next two Sections make it plaine where the *habendum* is added.

[298. b.]

Hereby alſo it appeareth, that a releaſe is more forcible in law than a confirmation. If the diſſeiſee and a ſtranger diſſeiſe the heire of the diſſeiſor, and the diſſeiſee confirme the eſtate of his companion, this ſhall not extinguiſh his right that was ſuſpended: ſo as if the heire or the diſſeiſor re-enter, the right of the diſſeiſee is revived. And ſo it is if the grantee of a rent-charge and an eſtranger diſſeiſe the tenant of the land, and the grantee confirme the eſtate of his companion, the tenant of the land re-enter, the rent is revived; for the confirmation extended not to the rent ſuſpended, otherwiſe it is of a releaſe in both caſes.

Sect. 523.

*ET pur ceo aſcuns ont dit, que ſi deux joyntenants ſont, et l'un confirme l'eſtate l'auter, que il n'ad ſorſque joint eſtate, ſicome il avoit adevant. Mes s'il ad tiels parols en le fait de confirmation, a aver et tener a luy et a ſes heires touts les tenements dont mention eſt fuit en le confirmation, donques il ad eſtate ſole en les tenements, * &c. Et pur ceo il eſt bone et ſure choſe en cheſcun confirmaſon d'aver ceux parolx; a aver et tener les tenements, &c. en fee, ou en fee taile, ou pur terme de vie, ou pur terme d'ans, ſolonque ceo que le cas † eſt, ou le matter giſt.*

AND for this ſome have ſaid, that if two joyntenants bee, and the one confirme the eſtate of the other, that he hath but a joynt eſtate, as he had before. But if hee hath ſuch words in the deede of confirmation, to have and to hold to him and to his heires all the tenements whereof mention is made in the confirmation, then he hath a ſole eſtate in the tenements, &c. And therefore it is a good and ſure thing in every confirmation to have theſe words; to have and to hold the tenements, &c. in fee, or in fee taile, or for terme of life, or for terme of yeares, according as the caſe is or the matter lyeth.

AND this confirmation leaveth the ſtate as it was, and doth not amount to any ſeverance of the joynture, as ſome have ſaid.

"*Mes s'il ad tiels parols en le fait, &c.*" This is plaine and evident enough. 34 E. 3. tit. Confirm. pl. 13.

"*Et pur ceo il eſt bone et ſure choſe, &c.*" This is good counſell, and worthy to be obſerved.

* *&c.* not in L. and M. nor Roh. † *eſt* not in L. and M. nor Roh.

Sect. 524.

*CAR al entent d'aſcuns, ſi home leſſa terre a un auter pur terme de vie, et puis confirma ſon eſtate que il ad en meſme la terre, a aver et tener ſon eſtate a luy et a ſes heires, ceſt confirmation quant a ſes heires eſt void, car ſes heires ne poient aver ſon eſtate, que * ne fuit forſque pur terme de ſon vie. Mes s'il confirma ſon eſtate per ceux parolx, a aver meſme le terre a luy et a ſes heires, ceſt confirmation fait fee ſimple en ceſt caſe a luy en la terre, pur ceo que † les parolx a aver et tener, &c. va a le terre, et nemy al eſtate que il ad, &c.*

FOR to the intent of ſome, if a man letteth land to another for life, and after confirme his eſtate which hee hath in the ſame land, to have and to hold his eſtate to him and to his heires, this confirmation as to his heires is voide, for his heires cannot have his eſtate, which was not but for terme of his life. But if he confirme his eſtate by theſe words, to have the ſame land to him and to his heires, this confirmation maketh a fee ſimple in this caſe to him in the land, for that the words to have and to hold, &c. goeth to the land, and not to the eſtate which hee hath, &c.

(1 Roll. Abr. 482.) 18 E. 3. 40. (Plo. 158. a.)

HERE the diverſity is apparent betweene a confirmation of the eſtate for life in the land to have and to hold the ſaid ſtate in the land to him and his heire, this cannot enlarge his eſtate, for his eſtate being but for life, that eſtate cannot bee extended to his heires. But in that caſe if he confirme the ſtate for life in the land in the premiſſes of the deed, and the *habendum* is in this ſort, to have and to hold the land to him and his heires, this ſhall enlarge his eſtate, and create in him a fee ſimple. [209. a.]

[e] Vid. Pl. Com. in Throgmorton's caſe, fol. 147. a. Wrotteſley's caſe. 197. (8 Rep. 23.)

Wherein is to bee noted, [e] that the *habendum* and the premiſſes doe in ſubſtance well agree together, and that the *habendum* may enlarge the premiſſes, but not abridge the ſame (1).

And ſeeing that in conveyances, limitations of remainders are uſuall and common aſſurances, it is dangerous by conceipts or nice diſtinctions to bring them in queſtion, as have in latter time beene attempted.

"*Son eſtate.*" Vide Sect. 650.

Sect. 525.

ITEM, ſi jeo leſſa certaine terre a un feme ſole pur terme de ſa vie, laquel prent baron, et puis jeo confirma

ALSO, if I let certaine land to a feme ſole for terme of her life, who taketh huſband, and after I confirme

* *ne* not in L. and M. nor Roh. † *les parolx—le* L. and M. and Roh.

(1) On the operation of an habendum in a deed, ſee ant. 21. a. Vin. Abr. Grant, J. K. L. and M.

firma l'eſtate le baron et ſa feme, a aver et tener ‡ pur terme de lour deux vies; en ceſt caſe le baron ne tient jointment ove ſa feme, mes tient en droit de ſa feme pur terme de ſa vie. Mes ceſt confirmation urera a le baron per voy de remainder pur terme de ſa vie, s'il ſurvequiſt ſa feme.

firme the eſtate of the huſband and wife, to have and to hold for terme of their two lives; in this caſe the huſband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation ſhall enure to the huſband by way of remainder for terme of his life, if hee ſurviveth his wife.

HERE is the fourth caſe wherein the releaſe and confirmation doe agree; and in this caſe it is to be obſerved, that the baron hath ſuch an eſtate in the land in the right of his wife as hee is capable of a confirmation to enlarge his eſtate; and therefore if the confirmation had been made of his eſtate to him alone, to have and to hold the land to him and to his heires, this had been good to have conveyed the fee ſimple to him after the deceaſe of his wife: for if in this caſe a releaſe be made to the huſband and his heires, this is ſufficient to convey the inheritance of the land to the huſband (a).

Vid. Sect. 573. (Sid 83. 361.) (2 Roll. Abr. 829.)

(Ant. 273. b.) 16 H. 6. tit. Releaſe 45. 22 E. 3. tit. Releaſe. Statham.

"*Ne tient jointment ove ſa feme.*" For two cauſes. Firſt, be-
[299. b.] cauſe the wife hath the whole for her life. Secondly, joyntenants muſt (as hath been before ſaid in the chapter of Joyntenants) come in by one title. But in this caſe if the confirmation had been made to the huſband and wife, to have and to hold the land to them two and to their heires, they had been joyntenants of the fee ſimple, and the huſband ſeiſed in the right of his wife for her life; for the huſband and the wife cannot take by moities during the coverture.

(4 Rep. 29.) 18 E. 3. 20. (1 Roll. Rep. 230. 317. 438. 3 Leo. 4. a. Ant. 184. a. 167. a. Poſt. 351. a.)

If a man letteth land to the huſband and wife, to have and to hold the one moity to the huſband for terme of his life, and the other moity to the wife for her life, and the leſſor confirme the eſtate of them both in the land, to have and to hold to them and to their heires; by this confirmation as to the moity of the huſband, it enureth only to the huſband and his heires, for the wife had nothing in that moity; but as to the moity of the wife, they are joyntenants, as hath bin ſaid; for the huſband hath ſuch an eſtate in his wife's moity, in her right, as is capable of a confirmation. But if ſuch a leaſe for life be made to two men by ſeverall moities, and the leſſor confirme their eſtates in the land, to have and to hold to them and to their heires, they are tenants in common of the inheritance; for regularly the confirmation ſhall enure according to the quality and nature of the eſtate which it doth enlarge and increaſe.

18 Aſſ. p. 3. 18 E. 3. Confir. 17. 17 E. 3. 68. 28 E. 3. 94. 40 E. 3. 8 Aſſ. 20.

If a leaſe for life be made to *A.* the remainder to *B.* for life, and the leſſor confirme their eſtates in the land, to have and to hold to them and their heires, *A.* taketh one moity to him and his heires, and therefore of the one moity he is ſeiſed for life, the remainder to *B.* for life, and then to him and his heires: of the other moity *A.* is ſeiſed for life, the immediate inheritance to *B.* and his heires; becauſe

‡ *la terre* added L. and M. and Roh.

(a) [See Note 260.]

because as to the moity which *B.* takes, the same is executed: as if the reversion be granted to tenant for life, and to a stranger, it is executed for one moity, (as hath been said before) and therefore in this case they are tenants in common.

39 H. 6. 9. (Ant. 182. b.)

If lands be given to two men, and to the heires of their two bodies begotten, and the donor confirmeth their two estates in the land, to have and to hold the land to them two and to their heires: in this case some are of opinion, that they shall be joyntenants of the fee simple, because the donees were joyntenants for life, and (say they) the confirmation must enure according to the estate which they have in possession, and that was joynt. But others hold the contrary. For, first, they say, that the donees have to some purposes severall inheritances executed, though between the donees survivor shall hold for their lives. Secondly, they say, that when the whole estate, which comprehendeth severall inheritances, is confirmed, the confirmation must enure according to the severall inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case.

Vid. Sect. 573.

"*Per voy de remainder, &c.*" Here some question hath been made of this terme remainder, without any cause at all, because in law it is in nature of a remainder. For in case of a fine, when a reversion expectant upon an estate for life in *A.* is granted to *B. et quæ ad ipsum reverti debet post mortem A. præfato B. & hæredibus suis remanent, &c.* and a more colourable exception might be taken against this word *remanent* there, than in the case of *Littleton*.

Pl. Com. Colthirst's case. Dyer. & Stud. ca. 21.

* 16 H. 6. tit. Release 45.

It is true, that in * 16 *H.* 6. it is called a reversion: in [*o*] 9 *E.* 4. it is called a remainder: in [*p*] 6 *E.* 3. it is said, that by the confirmation an estate accrued to the husband for terme of his life: in [*q*] 17 *E.* 3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should be *pugna verborum*, which learned and wise men ever avoide, all do resolve, that the estate of the husband is good, and that it shall enure by way of increase and inlargement of his estate. And albeit in this case of *Littleton*, the husband by the confirmation gaineth an estate for life in remainder, (as *Littleton* termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the meane remainder, because the husband himselfe committeth the waste, and doth the wrong; and therefore shall not excuse himselfe for his committing of waste, in respect he himselfe hath the remainder; no more than if a man lesseth to *A.* during the life of *B.* the remainder to him during the life of *C.* if he commit waste, an action of waste shall lie against him (a)

[o] 9 E. 4. 18.
[p] 6 E. 3. 9.
[q] 17 E. 3. 68. b.

17 E. 3. 68. b. Vi. Paget's case, lib. 5. fo. 76. b. (Ant. 54. a.)

(a) [See Note 261.]

Sect. 526.

MES ſi jeo leſſa al feme ſole terre pur terme d'ans, lequel prent baron, et puis jeo confirma l'eſtate le baron et ſa feme, a aver et tener la terre pur terme de lour deux vies: en ceſt caſe ils ont joynt eſtate en le franktenement de la terre, pur ceo que la feme n'avoit franktenement adevant, &c.

BUT if I let land to a feme ſole for terme of yeares, who taketh huſband, and after I confirm the eſtate of the huſband and his wife, to have and to hold the land for term of their two lives: in this caſe they have a joynt eſtate in the freehold of the land, for that the wife had no freehold before, &c.

THIS is the fifth caſe wherein the releaſe and confirmation doe agree: and it is to be obſerved, that chattels reals, as leaſes for yeares, wardſhips, and the like, are not given to the huſband abſolutely (as all chattels perſonals are), by the intermarriage, but conditionally if the huſband happen to ſurvive her, and he hath power to alien them, at his pleaſure: but in the mean time the huſband is poſſeſſed of the chattels reall in her right. [300. a.]

5 E. 3. 17. b. Pl. Com. 418. b. 38 H. 6. 28. 14 H. 4. 12. 38 E. 3. 35. Pl. Com. Dame Hale's caſe. 50 Aſſ. p. 15. 4 H. 6. 5. 6.

7 H. 6. 1. 9 H. 6. 52. 37 Lib. Aſſ. 21 H. 7. 29. 21 E. 4. 40. 26 H. 8. 7. (Ant. 46. b. Poſt. 351. a.)

Secondly, that the huſband hath ſuch a poſſeſſion in her right of the chattell, as is capable of a confirmation or of a releaſe. (Ant. 273. b. Ant. 276. a. Ant 299. a.)

Thirdly, that the confirmation in this caſe to the huſband and wife for their lives, maketh them joyntenants for life, becauſe a chattell of a feme covert may be drowned: and ſo note a diverſity betweene a leaſe for life and a leaſe for yeares made to a feme covert; for her eſtate of freehold cannot be altered by the confirmation made to her huſband and her, as the terme for yeares may, whereof her huſband may make diſpoſition at his pleaſure (1).

Sect. 527.

*ITEM, ſi mon diſſeiſor granta a un rent charge hors de la terre dont il moy diſſeiſiſt, et jeo reherſant le dit grant confirma meſme le grant, et tout ceo que eſt compriſe deins meſme le graunt, et puis jeo enter ſur le diſſeiſor; quære, en ceſt caſe, ſi le terre ſoit diſcharge de le rent ou nemy *.*

ALSO, if my diſſeiſor granteth to one a rent charge out of the land whereof he diſſeiſed mee, and I rehearſing the ſayde grant confirme the ſame grant, and all that which is compriſed within the ſame grant, and after I enter upon the diſſeiſor; *quære*, in this caſe, if the land be diſcharged of the rent or no.

THIS is the fifth caſe wherein the releaſe and confirmation doe differ; for a releaſe to the grantee in this caſe [a] were voide. It is holden by ſome authority ſince *Littleton* wrote, that the diſſeiſee [a] 11 H. 7. 28. Lib. 1. fol. 147. Anne Mayow's caſe. 8 H. 4. 10.

* &c. added in L. and M. and Roh.

(1) [See Note 26s.]

diſſeiſee after his re-entry ſhall not avoide the rent charge againſt his own confirmation: and there a generall rule is taken, that ſuch a thing as I may defeate by my entry, I may make good by my confirmation.

Li. 1. fo. 147, 148. Anne Mayow's caſe. (Poſt. Sect. 529.)

If the feoffee upon condition grant a rent charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he ſhall not avoide the rent charge. And ſo it is if the heire of the diſſeiſor grant a rent charge, and the diſſeiſee confirmeth it, and after recover the land, he ſhall not avoide the rent: and yet in neither of theſe caſes his entry was congeable at the time of the confirmation (2).

Sect. 528.

ITEM, ſi un parſon d'un eſgliſe charge le glebe de ſon eſgliſe per ſon fait, et puis le patron et l'ordinarie confirmont meſme le grant, † et tout ceo que eſt compriſe deins meſme le grant, donques le grant eſtoyera en ſa force, ſolonque le purport de meſme le graunt. Mes en tiel caſe covient que le patron eit fee ſimple en le vowſon; car s'il ‡ n'ad eſtate en lavowſon forſque pur terme de vie, ou en le taile, donque le grant ‡‡ ne eſtoyera forſque durant ſa vie, et la vie le parſon que grantaſt, &c*

ALSO, if a parſon of a church charge the glebe land of his church by his deed, and after the patron and ordinary confirme the ſame grant, and all that is compriſed in the ſame grant, then the grant ſhall ſtand in his force, according to the purport of the ſame graunt. But in this caſe it behoveth that the patron hath a fee ſimple in the advowſon; for if he hath but an eſtate for life, or in taile, in the advowſon, then the graunt ſhall not ſtand, but during his life, and the life of the parſon which granted, &c.

Glanv. li. 13. ca. 23, 24, 25. Bract. li. 4. ca. 285, &c. Brit. fo. 234. b. &c. Fleta li. 5. ca. 19, 20, & lib. 6. ca. 18. Reg. F. N. B. 48, 49. Brit. ubi ſupra.

"PARSON," *Perſonâ*. In the legall ſignification it is taken for the rector of a church parochiall, and is called *perſona eccleſiæ*, becauſe he aſſumeth and taketh upon him the perſon of the church, and is ſaid to be ſeiſed *in jure eccleſiæ*, and the law had an excellent end therein, viz. that in his perſon the church might ſue for and defend her right; and alſo be ſued by any that had an elder and better right; and when the church is full, it is ſaid to be *plena & conſulta* of ſuch a one parſon thereof, that is, full and provided of a parſon, that may *vicem ſeu perſonam ejus gerere*. [300. b.]

8 E. 3. 26. 43. 38 E. 3. 4. 3 Mar. Dyer. 123.

Perſona impersonata, parſon, impersonee is the rector, that is in poſſeſſion of the church parochiall, be it preſentative, or impropriate, and of whom the church is full.

7 H. 4. 15. (Mo. 67.)

Here are divers things to bee noted. Firſt, that the confirmation is of the grant, which in deed is but a meere aſſent by deed to the grant; and therefore it is holden, that if there be a parſon, patron, and ordinary, and the patron and ordinary give licence by deede to the parſon to grant a rent charge out of the glebe, and the parſon granteth the rent charge accordingly, this is good, and ſhall binde the ſucceſſor; and yet here is no confirmation ſubſequent, but a licence precedent.

Secondly,

* *le—an*, L. and M. and Roh.

† *et touts ce que eſt compriſe deins meſme le grant*, not in L. and M. nor Roh.

‡ *n'ad—ads*, L. and M. and Roh.

‡‡ *ne* not in L. and M. nor Roh.

(2) [See Note 263.]

Secondly, The ordinary alone, without the deane and chapter, may agree thereunto, either by licence precedent, or confirmation ſubſequent; for that the deane and chapter hath nothing to doe with that which the biſhop doth as ordinary, in the life-time of the biſhop. (1 Roll. Abr. 479. 481.)

Thirdly, [b] but if the biſhop be patron, there the biſhop cannot confirme alone, but the deane and chapter muſt confirme alſo; for the advowſon or patronage is parcell of the poſſeſſion of the biſhopricke; and therefore the biſhop, without the deane and chapter, cannot make the grant good, but only during his owne life, after the deceaſe of the incumbent, either by licence precedent, or confirmation ſubſequent. [b] 19 El. Dy. 356, 357. 11 H. 6. 9. 33 H. 8. tit. Charge. Br. 58. (Poſt. 329. a.)

A. parſon of *D.* is patron of the church of *S.* as belonging to his church, and preſents *B.* who by conſent of *A.* and of the ordinary, grants a rent charge out of the glebe; this is not good to make the rent charge perpetuall, without the aſſent of the patron of *A.* no more than the aſſent of the biſhop who is patron, without the deane and chapter, or no more than the aſſent of the patron, being tenant in taile or for life, as *Littleton* ſaith. And *Littleton* here ſaith, that the patron that confirmes muſt have a fee ſimple, meaning to make the charge perpetuall. (1) And *Littleton* after ſaith, that in the caſe of the parſon the fee is in abeyance, and ſeeing the conſent of the patron is in reſpect of his intereſt as heire, it appeareth by *Littleton*, he may conſent upon condition; otherwiſe it is of an attornement, becauſe that is a bare aſſent. Alſo if the eſtate of the patron be conditionall, and he confirmeth, and after the condition is broken, his confirmation is voide. Seemore of theſe kinds of confirmations in my Reports. Li. 2. 39 & 24. Li. 1. 153. lib. 4. 23, 24. lib. 5. fol. 31. 81. Lib. 10. 6. Lib. 11. 19. Lib. 6. 34.) (Ant. 274. b. 297. a. Sid. 75.) 31 E. 3. Grant. 61. 26 Aſſ. 38.

Fourthly, he that is patron muſt be patron in fee ſimple; for if hee be tenant in taile, or tenant for life, his confirmation or agreement is not good to bind any ſucceſſor, but ſuch as come into the church during his life. But if the patron be tenant in taile, and diſcontinue the eſtate in taile, the leaſe ſhall ſtand good during the diſcontinuance; or if the eſtate taile be barred, it ſhall ſtand good for ever. 8 Eliz. Dy. 252. Vid. lib. 3. fol. 73. Le caſe de deane & chapter de Norwich. (1 Lev. 112. 1 Roll. Ab. 488. 2 Roll. Abr. 389.)

But here is to be obſerved a diverſity betweene a ſole corporation, as parſon, prebend, vicar, and the like, that have not the abſolute fee in them, for to their grants the patron muſt give his conſent. But if there be a corporation aggregate of many, as dean and chapter, maſter, fellowes, and ſchollars of a colledge, abbot or prior, and covent, and the like, or any ſole corporation that hath the abſolute fee, as a biſhop with conſent of the dean and chapter, they may by the common law make any grant of or out of their poſſeſſions, without their founder or patron, albeit the abbot or prior, &c. were preſentable: and ſo it is of a biſhop, becauſe the whole eſtate and right of the land was in them, and they may reſpectively maintaine a writ of right. 12 H. 4. 11. 19 E. 3. 7. 7 Eliz. Dyer. 238. 11 H. 6. 9. 10 Eliz. Dy. 6 E. 3. 10. 2 E. 3. 29. 9 E. 4. 6. 2 H. 4. 11. 38 E. 3. 19. 25 E. 3. 54.

[301. a.] If a biſhop hath two chapters, and he maketh a grant, both chapters muſt confirme it, or elſe the ſucceſſor ſhall avoide it. But if one of the chapters be diſſolved, then the confirmation of the other ſufficeth; but it needeth not the confirmation of the king, who is founder and patron of all biſhoprickes (1). Temps R. 2. tit. grant. 104. 50 E. 3. tit. Aſſiſe Statham. 11 Eliz. Dyer 282.

And note a diverſity between a confirmation of an eſtate, and a confirmation of a deed; for if the diſſeiſor make a charter of feoffment

(1) [See Note 264.]

[301. a.]

(1) For the confirmation of leaſes made by eccleſiaſtical perſons, ſee Bacon's Abr. tit. Leaſes.

feoffment to *A.* with a letter of attorney, and before livery the diſſeiſee confirme the eſtate of *A.* or the deed made to *A.* this is cleerely voide, though livery be made after. But if a biſhop had made a charter of feoffment with a letter of attorney, and the deane and chapter before livery confirme the deed, this is a good confirmation, and livery made afterwards is good. And ſo it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reverſion before attornment.

In the ſame manner it is if a biſhop at the common law had granted lands to the king in fee by deed, and the deane and chapter by their deed confirme the deed of the biſhop, and after the deed of the biſhop is inrolled, this is good, albeit the confirmation of the deane and chapter be not inrolled; for the aſſent upon the matter is made to the biſhop.

But this confirmation that *Littleton* here ſpeaketh of muſt be made in the life, and during the incumbency of the perſon; and ſo in the life of the biſhop, or of any other ſole corporation. But it is to be knowne that grants made by parſons, prebends, vicars, biſhops, maſter and fellowes of any colledge, deane and chapter, maſter or gardeine of any hoſpitall, or any having any ſpirituall or eccleſiaſticall living are reſtrained by [e] divers acts of parliament, ſo as they cannot grant any rent charge, or to make any alienation, or to make any leaſes other than ſuch as are mentioned in thoſe acts, which you may reade at large, and the expoſitions upon the ſame, in my [*] Commentaries.

35 E. 3. Confirm. 22. 31 E. 3. Abb. 10. 21 H. 7. 1. Vid. Sect. 393 & 648.

[e] 13 Eliz. cap. 10. 1 Eliz. cap. 19. 18 Eliz. ca. 11. 1 Jac. cap. 3. Vid. Sect. 593. & 648.

[*] Li. 2. fo. 46. lib. 4. 76 & 120. li. 5. 9. 6. 14. li. 6. 37. lib. 7, 8. lib. 11. 67.

Sect. 529.

ITEM, ſi home leſſa terre per terme de vie, le quel tenant a terme de vie charge la terre ove un rent en fee, et celuy en le reverſion confirma meſme le grant, le charge eſt aſſets bone et effectuall.

ALSO, if a man leaſeth land for term of life, the which tenant for life charge the land with a rent in fee, and hee in the reverſion confirme the ſame grant, the charge is good enough and effectuall.

26 Aſſ. pl. 38. 45 Aſſ. pl. 13. Lib. 1. fol. 147. Anne Muyowe's caſe. (1 Roll. Abr. 483.) 14 Aſſ. pl. 14.

HERE is a diverſity to bee obſerved, where the determination of the rent is expreſſed in the deed, and when it is implyed in law. For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reverſion makes that grant good for ever, without words of inlargement, or clauſe of diſtreſſe, which would amount to a new grant. And yet if the tenant for life had granted a rent to another and his heires by expreſſe words, during the life of the grantor, and the leſſor had confirmed that grant, that grant ſhould determine by the death of tenant for life.

Tenant for life upon a condition grant a rent in fee, the leſſor confirme the grant, and after the condition is broken, the leſſor re-enter, he ſhall not avoide the grant.

Sect. 530.

ITEM, si soit un perpetual chantarie, dont l'ordinarie n'ad rien a medler ne a faire; quære, *si le patron del chauntery, et le chapleine de mesme le chauntery poient charge le chauntery ove un rent charge en perpetuitie.*

ALSO, if there bee a perpetuall chanterie, wherewith the ordinary hath nothing to doe or meddle; *quære*, if the patron of the chantery, and the chapleine of the same chantery may charge the chantery with a rent charge in perpetuitie.

THIS is meant of a chauntery donative wherewith the ordinary hath not to deale, and by this grant, when *Littleton* wrote, the chauntery should have been charged for ever, because no other had any interest in this chantery save only the patron and chauntry priest, and the grant is made *concurrentibus his quæ in jure requiruntur*. But since *Littleton* wrote, all, and all manner of free chappels and chaunteries perpetuall, whereof *Littleton* here speakes, are by [a] acts of parliament given to the crowne, and the bodies politike thereof dissolved. See hereafter, *Section* 648, more at large of all this present *Section*.

Vid. Sect. 648. (Cro. Jac. 63.) (10 Co. Lamper's case.) (Post. 344.)

[301. b.]

[a] 37 H. 8. ca. 4. 1 E. 6. c. 14.

Sect. 531.

*ITEM, en aſcun cas ceſt verbe dedi, * ou ceſt verbe* conceſſi, *ad mesme l'effect en ſubſtance, et urera a mesme l'entent, come ceſt verbe* confirmavi. *Sicome jeo fue diſſeiſie d'un carue de terre, et † jeo face tiel fait*; Sciant præſentes, &c. quòd dedi *a le diſſeiſor*, ‡ &c. vel quòd conceſſi *a le dit diſſeiſor, le dit carue, &c. et jeo deliver ſeulement le fait a luy ſauns aſcun livery de ſeiſin del terre, c'eſt un bone confirmation, et auxy fort en ley, ſicome il avoit en le fait ceſt verbe* confirmavi, &c.

ALSO, in some case this verbe *dedi*, or this verbe *conceſſi*, hath the same effect in substance, and shall enure to the same intent, as this verbe *confirmavi*. As if I bee disseised of a carue of land, and I make such a deed; *Sciant præſentes, &c. quòd dedi* to the disseisor, &c. or *quòd conceſſi* to the said disseisor, the said carue, &c. and I deliver onely the deed to him without any liverie of seisin of the land, this is a good confirmation, and as strong in law, as if there had beene in the deed this verbe *confirmavi*, &c.

HERE *Littleton* proceedeth, according to the former division, to shew words that in law do amount to a confirmation. And here is to bee observed, that some words are large, and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi*, or *conceſſi*, may amount

Bra. li. 2. fo. 59. b. 21 H. 6. feoffments &

* *ou—et*, L. and M. and Roh.
† *puis* added L. and M. and Roh.
‡ &c. VEL QUOD CONCESSI *a le diſſeiſor, &c.* not in L. and M. nor Roh.

faits 103. 22 H. 6. 42. 14 H. 4. 36. 19 H. 6. 44. amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender, &c. and it is in the election of the party to uſe to which of theſe purpoſes he will.

7 H. 7. 16. 32 E. 3. briefe 291. Brooke tit. Confirm. 20. 14 H. 7. 2. 37 H. 6. 17. Dyer 8 Eliz. 4 H. 7. 10. 22 E. 4. 36. 40 E. 3. 41. (Sid. 452. Plo. 196. 5 Rep. 17. a. 1 Roll. Abr. 482. Noy 66.)

Bracton. lib. 2. fol. 59. b. *Eſt autem confirmatio quaſi quædam ratihabitio, ſufficit tamen quandoque per ſe, ſi etiam in ſe contineat donationem, ut ſi dicat quis, dedi et confirmavi, licèt juvari poſſit ex aliquâ donatione præcedente.*

But a releaſe, confirmation, or ſurrender, &c. cannot amount to a grant, &c. nor a ſurrender to a confirmation, or to a releaſe, &c. becauſe theſe bee proper and peculiar manner of conveyances, and are deſtined to a ſpeciall end (1).

(4 Rep. 80. b. 2 Cro. 169. Mo. 34. Plo. 397, 398.)

"*Dedi et conceſſi, &c.*" Here is implyed that there be more words than *dedi* and *conceſſi*, that will amount to a confirmation, as *dimiſi*. [e] In ancient ſtatutes and in originall writs, as in the writ of entry *in caſu proviſo*, *in conſimili caſu ad communem legem*, and many others, this word *dimiſi* is not applyed only to a leaſe for life, but to a gift in taile, and to a ſtate in fee. [f] Alſo if a man make a leaſe to *A.* for yeares, and after by his deed the leſſor *voluit quòd haberet et teneret terram pro termino vitæ ſuæ*; this is adjudged by this verbe (*volo*) to bee a good confirmation for terme of his life. *Benignè enim faciendæ ſunt interpretationes cartarum propter ſimplicitatem laicorum ut res magis valeat quàm pereat.*

[e] 32 E. 3. briefe 291. Brooke tit. Confirm. 20. Vid. le ſtat. de Gloc. ca. 4.

[f] 7 E. 3. 9. Bracton. (Plo. 159.)

And he to whom ſuch a deed comprehending *dedi, &c.* is made, may plead it as a grant, as a releaſe, or as a confirmation, at his election (2).

14 H. 4. 36. Lib. 5. fol. 15. in Newcomen's caſe.

If a parſon and ordinary make a leaſe for yeares of the glebe to the patron, and the patron by his deede granteth it over, or if the diſſeiſor granteth a rent to the diſſeiſee, and he by his deed granteth it over, and after re-enter; in both theſe caſes one and the ſame words doe amount both to a grant, and to a confirmation in judgement of law of one and the ſame thing, *ne res pereat*. And ſo it is if a diſſeiſor make a leaſe for life, or a gift in taile, the remainder to the diſſeiſee in fee, the diſſeiſee by his deed granteth over the remainder, the particular tenant attorneth, the diſſeiſee ſhall not enter upon the tenant for life, or in taile, for then he ſhould avoide his owne grant, which amounted to a grant of the eſtate, and a confirmation alſo. [302. a.]

(Ant. 280. 298. 5 Rep. 15, 16.)

(Sid. 453.)

Sect. 532.

*ITEM, ſi jeo leſſa terre a un home pur terme d'ans, per force de quel il eſt * en poſſeſſion, &c. et puis jeo face un fait a luy, &c.* quòd dedi & conceſſi,

ALSO, if I let land to a man for terme of yeares, by force whereof he is in poſſeſſion, &c. and after I make a deede to him, &c. *quòd dedi & conceſſi,*

* *en poſſeſſion, &c.—poſſeſſione*, L. and M. and Roh.

(1) The effect of the word grant, in implying a warranty, will be conſidered in a note on the chapter of Warranty.

(2) [See Note 265.]

conceſſi, &c. *le dit terre, a aver pur terme de ſa vie, et delivera a luy le fait, &c. donques maintenant il ad eſtate en le terre pur terme de* * *ſa vie.*

& conceſſi, &c. the ſaid land, to have for terme of his life, and I deliver to him the deed, &c. then preſently hee hath an eſtate in the land for terme of his life.

HERE is the ſixth caſe wherein the confirmation and the releaſe doe agree, and is evident, and needeth no explication.

Sect. 533.

ET ſi jeo die en le fait, a aver et tener a luy et a ſes heires de ſon corps engendres, il ad eſtate en fee taile. Et ſi jeo die en le fait, a aver et tener a luy et a ſes heires, il ad eſtate en fee ſimple. Car ceo urera a luy per force de † *confirmation d'enlarger ſon eſtate.*

AND if I ſay in the deede, to have and to hold to him and to his heires of his body engendred, hee hath an eſtate in fee taile. And if I ſay in the deed, to have and to hold to him and to his heires, he hath an eſtate in fee ſimple. For this ſhall enure to him by force of the confirmation to inlarge his eſtate.

THIS alſo is evident, and needeth no explication, ſaving that whenſoever a confirmation doth inlarge and give an eſtate of inheritance, there ought to be apt words (as *Littleton* here expreſſeth them) uſed for the ſame.

Sect. 534.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor devie ſeiſie, et ſon heire eſt eins per diſcent, et puis le diſſeiſee et l'heire ‡ *le diſſeiſor font jointment un fait a un auter en fee, et livery de ſeiſin ſur ceo eſt fait (quant al heire le diſſeiſor que enſealaſt le fait) les tenements paſſont* † *et uront per meſme le fait per voy de feoffment; et quant al diſſeiſee que enſealaſt meſme le fait, ceo ne urera* § *jinon per voy de confirmation. Mes ſi le diſſeiſee en ceſt cas port briefe d'entre en le per et cui envers l'alienee* ‖ *del heire le diſſeiſor; quære,*

ALSO, if a man be diſſeiſed, and the diſſeiſor die ſeiſed, and his heire is in by diſcent, and after the diſſeiſee and the heire of the diſſeiſor make joyntly a deede to another in fee, and livery of ſeiſin is made upon this, (as to the heire of the diſſeiſor that ſealed the deed) the tenements doe paſſe and enure by the ſame deed by way of feoffment; and as to the diſſeiſee who ſealed the ſame deed, this ſhall enure but by way of confirmation. But if the diſſeiſee in this caſe brings a writ of entrie in the *per* and

* *ſa* not in L. and M. nor Roh.

† *confirmation—confirmamus*, L. and M. and Ron.

‡ *le diſſeiſor* not in L. and M. nor Roh.

† *et uront* not in L. and M. nor Roh.

§ *jinon—mes*, L. and M. and Roh.

‖ *del—le*, L. and M. and Roh.

quære, *comment il pledra cel fait envers le demandant per voy de confirmation*, &c. *Et saches, mon fits, que est un des pluis honorables, laudables, et profitables choses en nostre ley, de veer le science de bien pleder en actions reals et personals; et pur ceo jeo toy counsaile especialment de mettre † ton courage et cure de ceo apprender* ‡.

and out against the aligree of the heire of the disseisor, *quære*, how he shall plead this deede against the demandant by way of confirmation, &c. And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learne this.

"*QUANT al heire del disseisor, &c. les tenements passont per voy de feoffment.*" For the land shall ever passe from him that hath the state of the land in him. As if *cestuy que use* and his feoffees after the statute of 1 *R.* 3. and before the statute of 27 *H.* 8. *cap.* 10. had joyned in a feoffment, it shall be the feoffment of the feoffees, because the state of the land was in him. [302. b.]

So it is if the tenant for life, and hee in the remainder or reversion in fee, joyne in a feoffment by deede. The livery of the freehold shall move from the lessee, and the inheritance from him in the reversion or remainder, from each of them according to his estate. For it cannot bee adjudged by law, that the feoffment of tenant for life doth draw the reversion or remainder out of the lessor or him in remainder, or doth worke a wrong because they joyned together (1).

21 H. 7. 34. b. Pl. Com. 59. a. in Wimbishe's case. (6 Rep. 15. a.) Pl. Com. 59. a. Pl. Com. 140. in Browning's case. 2 H. 5. 7. 13 H. 7. 14. 13 E. 4. 4. a. 27 H. 8. 13. M. 16 & 17 El. 339. (Sid. 83.) (1 Roll. Abr. 635.) (Ant. 45. a.) (1 Rep. 76, 77.)

If there bee tenant for life, the remaynder in tayle, &c. and tenant for life and he in the remainder in tayle levie a fine, this is no discontinuance or devesting of any estate in remainder, but each of them passe that which they have power and authority to passe.

Lib. 1. fo. 76. Bredon's case. (Ant. 251. b.)

A. tenant for life, the remainder to *B.* for life, the remainder in tayle, the remainder to the right heires of *B. A.* and *B.* joyne in a feoffment by deede, albeit it may be said that this is the feoffment of *A.* and the confirmation of *B.* and consequently hee in the remainder in tayle cannot enter for the forfeiture during the life of *B.* but because *B.* joyned in the feoffment, which was torcious to him in the remainder in taile, and is *particeps criminis*, therefore they forfeited both their estates, and he in the remainder in tayle might enter for the forfeiture. But if he in the reversion in fee and tenant for life joyne in a feoffment by paroll, this shall be (as some hold) first, a surrender of the estate of tenant for life, and then the feoffment of him in the reversion; for, otherwise, if the whole should passe from the lessee, then he in the reversion might enter for the forfeiture, and every man's act (*ut res magis valeat*) shall be construed most strongly against himselfe.

17 Eliz. Dyer 339. (1 Leo. 31.) (1 Leo. 31. 202.)

And it is to be observed that *Littleton* here putteth a discent, so as the entry of the disseisee is not lawfull; for if the disseisor and disseisee

* *&c.* not in L. and M. nor Roh.
† *aut* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.

(1) [See Note

diſſeiſee joyne in a charter of feoffment, and enter into the land, and make livery, it ſhall be accounted the feoffment of the diſſeiſee, and the confirmation of the diſſeiſor.

[303. a.] "*Quære coment il pledera ceſt fait, &c.*" Hee may pleade the feoffment of the heire of the diſſeiſor, and the confirmation of the diſſeiſee as it hath been pleaded and allowed. Lib. 1. fo. 146, 147. Mayowe's caſe.

"*Et ſachez, mon fits, que eſt un de pluis honorable, &c.*" Here is to bee obſerved the excellency of good pleading, and *Littleton's* graue advice, that the ſtudent ſhould imploy his courage and care for the attaining thereof, which hee ſhall attaine unto by three meanes: firſt, by reading; ſecondly, by obſervation; and thirdly, by uſe and exerciſe. For in ancient time the ſerjeants and apprentices of law did draw their owne pleadings, which made them good pleaders. And in this ſenſe *placitum* may be derived *à placendo, quia omnibus placet.* See my Preface to the 9 Bookes of my Reports. (Ante 17. a. 126. b. 181. a. 263. a. Sid. 339.)

Now ſeeing good pleading is ſo honourable and excellent, and that many a good cauſe is daily loſt for want of good and orderly pleading, it is neceſſary to ſet downe ſome few rules (amongſt many) of the ſame, to facilitate this learning, that is ſo highly commended to the ſtudious reader. For when I diligently conſider the courſe of our bookes of years and termes from the beginning of the reigne of *Edw.* 3. I obſerve, that more jangling and queſtions grew upon the manner of pleading, and exceptions to forme, than upon the matter it ſelfe, and infinite cauſes loſt or delayed for want of good pleading. Therefore it is a neceſſary part of a good common lawyer to be a good prothonotary. And now wee will performe our promiſe.

The order of good pleading is to be obſerved, which being inverted great prejudice may grow to the party, tending to the ſubverſion of law. *Ordine placitandi ſervato, ſervatur & jus, &c.*

First, in good order of pleading a man muſt pleade to the juriſdiction of the court. Secondly, to the perſon; and therein firſt to the perſon of the plaintife, and then to the perſon of the defendant. Thirdly, to the count. Fourthly, to the writ. Fifthly, to the action, &c. [a] which order and forme of pleading you ſhall reade in the ancient authors agreeable to the law at this day; and if the defendant miſorder any of theſe he loſeth the benefit of the former. [a] Bracton li. 5. fo. 400. Britton fo. 41. a. & 122. Fleta li. 6. ca. 35, 36, &c. 40 E. 3. 9. b. 17 E. 3. 74. 8 E. 3. 5 & 9. 35 H. 6. 12.

The count muſt be agreeable and conforme to the writ, the barre to the count, &c. and the judgement to the count; for none of them muſt be narrower or broader than the other.

A count or declaration, which anciently and yet is called *narratio*, ought to containe two things [b] viz. certainty and verity, for that it is the foundation of the ſuite, whereunto the adverſe party muſt anſwer, and whereupon the court is to give his judgement: [c] *Certa debet eſſe intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.* But it muſt be underſtood that there be three kinde of certainties: firſt, to a common intent, and that is ſufficient in a barre which is to defend the party and to excuſe him. [d] Secondly, a certaine intent in generall, as in counts, replications, and other pleadings of the plaintife, that is to convince the defendant, and ſo in inditements, &c. Thirdly, a certaine intent in every particular, as in eſtoppels. [b] Pl. Com. fo. 121, 122. 3 E. 4. 21. Vid. lib. 5. fo. 120, 121. [c] Bracton lib. 2. fo. 140. [d] Lib. 5. 120, 121. Long's caſe. Pl. Com. 56. Wimbiſh's caſe.

He

[e] 7 H. 6. 17. 32 H. 6. 12. 15. Pl. Com. 33. b.

[e] He pleadeth a plea in abatement of the writ (which of ancient times was, and yet is called *breve*) or a plea after the latter continuance, ought to plead it certainly.

[f] 34 H. 6. 48. 8 H. 5. 4. b. 21 E. 4. 52. 5 E. 3. 15. 39 H. 6. 3. 10 H. 6. 2. 21 H. 7. 26.

[f] The ancient formes of courts are to be duly observed, as *cùm dimisit*, or *cùm dedit*, and not to say, that he was seised and demised, &c. (And yet if he say so, it maketh not the count vicious) [g] but in a barre replication or other kinde of pleading, the party must alledge a seisin in the lessor or donor, and ancient formes of pleading are also to be observed.

[g] 43 E. 3. 8. Aide 32. 9 H. 6. 59. 10 E. 4. 4. 2 H. 4. 13. 6 H. 4. 2. b. 10 E. 4. 2. F. N. B. 156. c. 11 E. 3.

[h] Pl. Com. Bret's case. 342. 27 H. 8. 27. 27 H. 6. 9 H. 7.

[h] Counts, or such as be in nature of counts, (as an avowry, wherein the defendant is an actor) need not to be averred, but all other pleas in the affirmative ought to be averred, *et hoc paratum est verificare, &c.* but pleas meerly in the negative ought not to be averred, because a negative cannot be proved.

[i] 40 E. 3. 31, 32, 33. 41 E. 3. 11. 9 H. 6. 46. 27 E. 3. 81. 44 E. 3. 23.

[i] Where there is but one tenant or one defendant, he cannot have two such pleas, as each of them doe goe to the whole: but where there are divers, each of them may pleade severall pleas which extend to the whole (1).

45 E. 3. Double plea 39. 43 E. 3. 21. 36 H. 6. 29. 37 H. 6. 23. 33 H. 6. 51. 15 E. 4. 25. 7 H. 4. 12. 41 E. 3. Double plea 78.

[k] Pl. Com. 81. 11 H. 4. 89. 34 H. 6. 48. 19 R. 2. Action sur le case. 52.

[k] That which is alledged by way of conveyance or inducement to the substance of the matter need not to be so certainly alledged, as that which is the substance it selfe.

22 E. 3. 19. 30 E. 3. 9.

[l] 5 H. 7. 8. 6 E. 4. 9. 21 E. 4. 44. 27 H. 8. 4.

[l] Every plea must be direct, and not by way of argument, or rehearsall.

22 H. 6. 17 E. 4. 7. 22 E. 4. 8.

[m] Pl. Com. 65. a. b. & 100. 376 & 410. 22 H. 6. 38. 19 H. 6. 49. 37 H. 6. 14. 36 H. 6. 5. 21 E. 4. 54. 11 H. 6. 15. 38 H. 6. 23. 42 Ass. 3. 48 E. 3. 11. 4 E. 4. 12. 9 E. 3. 45.

[m] Where a matter of record is the foundation or ground of the suite of the plaintife, or of the substance of the plea, there it ought to be certainly and truly alledged; otherwise it is, where it is but conveyance. But the proceedings and sentences in the ecclesiasticall courts may be alledged summarily; as that a divorce was had between such parties, for such a cause, and before such a judge, and *concurrentibus iiis quæ in jure requiruntur*; for the judge must be alledged, to the intent the court may write to him if it be denied.

Good matter must be pleaded in good forme, in apt time, and in due order, or otherwise great advantages may be lost.

21 E. 4. 52. 12 H. 8. 5, 6. 35 H. 6. 35. 7 E. 4. 32. 10 H. 7. 9. 15. 9 E. 4. 24. 11 H. 7. 8. 8 E. 4. 31. 22 E. 3. 2. 8 Ass. 29. 34 H. 6. 27. 5 E. 4. 70. 3 E. 4. 1.

[n] 35 H. 6. 35. 21 E. 4. 51. 9 H. 4. 5. 10 H. 6. 13. 5 E. 4. 18. 10 E. 4. 18. 13 H. 7. 18.

[n] Generall estates in fee simple may be generally alledged, but the commencement of estates tayle, and other particular estates regularly must be shewed, unlesse in some cases where they are alledged by way of inducement, and the life of tenant in taile, or for life, ought to be averred. [303. b.]

56 H. 8. Pleading Br. 160.

When

(1) [See Note 267.]

[o] When any ſpeciall and ſubſtantiall matter is alledged by either party, that ought to bee eſpecially anſwered, and not to be paſſed over by a generall pleading. [o] V. Sect. 193. 3 H. 6. 47. 41 E. 3. 22. 9 Aſſ. 9.

22 Aſſ. 45. 2 E. 3. 42. 13 E. 3. Anc. Demeſne 15. 20 E. 3. ib. 45. 7 H. 7. 8. Lib. 10. fo. 91. Li. 11. fo. 10.

[p] The plea of every man ſhall be conſtrued ſtrongly againſt him that pleadeth it, for everie man is preſumed to make the beſt of his owne caſe: *ambiguum placitum interpretari debet contra profitentem.* [p] 3 H. 7. 3. 26 Aſſ. 10. 14 H. 4. 4. b. 27 H. 6. 8. b. 21 H. 6.

Debt. 43. 7 H. 6. 24. 31. 35 H. 6. 48. 47 E. 3. 14. Pl. Com. 46. a. Li. 3. fo. 59, Linc. Col. caſe.

[q] Every plea that a man pleadeth ought to be triable, for without triall the cauſe can receive no end: *et expedit reipublicæ ut ſit finis litium.* [q] 22 E. 4. 40. 2, 3. 20 E. 4. 10. 21 E. 4. 36. 22 H. 6. 50.

[r] The tenant before his default ſaved, may plead all pleas which prove the writ abated, as death, &c. or matters apparent in the writ; but no plea, which prove it abateable, as taking of huſband, &c. [r] 40 E. 3. 40. 46. 41 E. 3. 2. 18 E. 3. 16. 26 E. 3. 68.

42 E. 3. 3. 10. 46. 6 E. 3. 37. 8 E. 3. 20. 10 E. 3. 60. 14 H. 4. 15. 12 E. 4. 1. 38 E. 3. 28. 7 H. 7. 3.

[s] When a man is authoriſed to doe any thing by the common law, by grant, commiſſion, act of parliament, or by cuſtome, he ought to purſue the ſubſtance and effect of the ſame accordingly. [s] 10 E. 4. 3. 27 H. 6. 8. 8 H. 7. 13. 9 H. 7. 26.

37 H. 6. 1. 27 H. 8. 13. 21 H. 7. 25. 11 H. 4. 33. Pl. Com. 79. 16 E. 4. 10. 1 H. 7. 33. 20 H. 7. 1. 6 E. 4. 4, 5. 21 E. 4. 54. 32 H. 6. 47. 11 H. 6. 8. 25 E. 3. 50. b. 23 Aſſ. 7. 2 Eliz. Dyer 184.

[t] All neceſſary circumſtances implied by law in the plea need not to be expreſſed, as in the plea of a feoffment of a mannor, livery and attornement are implied. [t] Pl. Com. 149. b. & 105. a. 37 H. 6. 38.

[u] When a count, barre, replication, &c. is defective in reſpect of omiſſion of ſome circumſtance, as time, place, &c. there it may be made good by the plea of the adverſe party; but if it be inſufficient in matter, it cannot be ſalved. [u] 18 E. 4. 16. b. 22 E. 4. 2. 76. 5 H. 7. 13. 38 H. 6. 17, 18, 19.

18 E. 3. 34. Pl. Com. 229. b. Lib. 8. 133. Turner's caſe.

[w] Every man ſhall plead ſuch pleas as are pertinent for him, according to the quality of his caſe, eſtate, or intereſt, as diſſeiſors, tenants, incumbents, ordinaries, and the like. [w] 5 H. 7. 34. 5 E. 3. 26. 22 H. 6. 28.

[x] Surpluſage ſhall never make the plea vicious, but where it is contrarient to the matter before (1). [x] 19 H. 6. 30. 32. Pl. Com. 232. b. & fo. 502. per Dyer & 503.

[y] That which is apparent to the court by neceſſary collection out of the record need not to be averred. [y] 13 H. 4. 17. 10 E. 4. 18. 33 H. 6. 54.

35 H. 6. 30. 21 H. 7. 32. Bract. li. 3. fo. 154. Pl. Com. 87. b. 26 H. 6. Gard. 58.

[z] A man is bound to performe all the covenants in an indenture: if all the covenants be in the affirmative, he may generally plead [z] 2 H. 7. 15. 4 H. 7. 12. 10 H. 7. 12. 13 H. 7. 19. 26 H. 8. 5. b.

(1) And then it does, becauſe the plaintiff cannot diſcern what to anſwer to in his replication. Note to the 11th edition.

plead performance of all; but if any be in the negative, so to many he muſt plead ſpecially (for a negative cannot be performed), and to the reſt generally. [b] So if any be in the diſjunctive, he muſt ſhew which of them he hath performed. So if any are to be done of record, he muſt ſhew that ſpecially, and cannot involve that in generall pleading.

[b] Li. 8. fo. 133. Turner's caſe, & fo. 120. Bonham's caſe. Li. 9. 85. 61. Li. 10. 100.

[c] In many caſes the law doth allow generall pleading, for avoyding of prolixity and tediouſneſſe, and that the particulars ſhall come on the other ſide.

[c] 12 H. 8. 6, 7. 2 H. 3. 17. 14 E. 4. 7. 9 E. 4. 19.

[d] Pleadings which amount to the generall iſſue are not to be allowed; but the generall iſſue is to be entred. *Vid. Sect.* 701. 485. 499.

[d] 44 E. 3. 2. 34 H. 6. 5. 10 H. 6. 6. & 17. 12 E. 4. 11. 14. 14 H. 8. 24. 7 E. 3. 12. 17 E. 3. 44.

[e] Every plea ought to have his proper concluſion, as a plea to the writ to conclude to the writ, a plea in barre to conclude to the action, an eſtoppell to relie upon the eſtoppells: *et ſic de ſimilibus.*

[e] 18 H. 6. 33. 22 H. 6. 53. 36 H. 6. 17. 38 H. 6. 18. 25. 5 E. 3. 15, 16. 22 Aſſ. 33. 2 Eliz. Dyer 181.

[f] When the concluſion of a plea, *et iſſint, et ſic*, is in the affirmative, it ſhall not wave the ſpeciall matter, for there the ſpeciall matter is the ſubſtance and foundation of the concluſion, and affirmed by the ſame. But where the concluſion is in the negative, there the ſpeciall matter regularly is waved.

[f] Pl. Com. 14. 25. 2 E. 4. 18. 39 E. 3. 14. 32. 33. 8 E. 3. 57. Qu. Imp. 25. 18 H. 6. 30. 7. 4. 18. 38 Aſſ. 14. 24 E. 3. 46. 22 E. 3. 13. 38 H. 6. 25. 32 H. 6. 14. 19 H. 8. 7. 27 H. 8. 12. b.

[g] Whenſoever ſpeciall matter is pleaded, and the concluſion (*et ſic*) is to the point of the writ or action, the ſpeciall matter is waved.

[g] 7 E. 4. 26. 11 H. 7. 4. 12 H. 7. 6. 33 H. 6. 9. 37, 43.

The names of legall records are, a writ, a count, a barre, a replication, a rejoynder, a rebutter, a ſurrebutter, &c.

[h] New and ſubtill devices and inventions of pleading ought not to alter any principle of law, whereof you have heard plentifully before.

[h] V. Sect. 485.

The count or declaration is an expoſition of the writ, and addeth time, place, and other neceſſary circumſtances, that the ſame may be triable; and any imperfection in the count doth abate the writ.

Pleadings are divided into barres, replications, rejoynders, ſurrejoynders, rebutters, and ſurrebutters, &c. They are words of art, and are called barres, *barræ*, ſo called, becauſe it barreth the plaintife of his action. *Replicationes, à replicando; rejunctiones, à rejungendo; rebutter*, of the French word, *rebouter*, i. e. *à repellendo*, to put backe or avoide, and ſo of ſurrebutter.

But each party muſt take heed of the ordering of the matter of his pleading, leſt his replication depart from his count, or his rejoynder from his barre; *et ſic de cæteris.*

[i] In ancient writers a barre is called *exceptio peremptoria*; a replication was then called *replicatio*, as now it is; a rejoinder *triplicatio*; a ſurrejoinder, *quadriplicatio; et ſic ulterius in infinitum.*

[i] Brack. li. 5. fo. 400. Flet. li. 6. ca. 37.

A departure in pleading is ſaid to be when the ſecond plea containeth matter not purſuant to his former, and which fortifieth not the ſame, and thereupon it is called *deceſſus*, becauſe he departeth from his former plea; and therefore whenſoever the rejoynder (taking one example for all) containeth matter ſubſequent

(Sid. 10. 77. 176. 277. Finch 391. 2 Cro. 264.) 39 E. 3. 13. b. 38 H. 6. 15. 6 H. 7. 8.

to

to the matter of the barre, and not fortifying the same, this is regularly a departure, because it leaveth the former, and goeth to another matter. As if in an assise the tenant plead a discent from his father, and giveth a colour, the demandant intituleth himselfe by a feoffement from the tenant himselfe, the plaintife cannot say, that that feoffement was upon condition, and so shew the condition broken; for that should be a cleare departure from his barre, because it containeth matter subsequent. But in an assise, if the tenant pleadeth in barre, that *I. S.* was seised and infeoffed him, &c. and the plaintife sheweth, that he himselfe was seised in fee, until by *I. S.* disseised, who infeoffed the tenant, and he re-entred, the defendant may plead a release of the plaintife to *I. S.* for this doth fortifie the barre.

21 H. 6. 32. Pl. Com. 105. 1 Mar. Dyer 95. 28 H. 8. ib. 31. (Doc. Pla. 112. 1 Cro. 228, 229. 257.) 6 H. 7. 8. 5 H. 6. Departure 2.

If a man plead performance of covenants, and the plaintife reply, that he did not such an act according to his covenant, the defendant saith, that he offered to do it, and the plaintife refused it; this is a departure, because the matter is not pursuant; for it is one thing to doe a thing, and another to offer to doe it, and the other refused to doe it: therefore that should have been pleaded in the former plea. *Vide & cave* in a *quare impedit*, what plea shall be safely pleaded *in primo placito*.

(Sid. 10. 77. 180. 404.) 8 El. Dy. 253. 23 El. Dy. 371. 6 E. 3. 5. 40 E. 3. 32. 43 E. 3. 32. 43 E. 3. 11. 1 E. 4. 4. 18 E. 4. 24.

When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of parliament. So when in his former plea he intituleth himselfe generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.

5 H. 7. 27. 8 H. 6. 12. 33 H. 6. 14. (Cro. Car. 257. 1 Saund. 83. 189.)

If a man plead an estate generally, (as for example a feoffement in fee) he in his second plea shall not maintain it by other matter *tantamount* in law, as by a disseisin and release, or by a lease and release, or a gift in tayle in barre, and in the second plea a recovery in value; for this is a departure: but he in that case shall count of a gift, and maintaine it in his replication by a recovery in value, because he could have no other count.

Pl. Com. 103. b. Fulmerston's case. 21 H. 7. 25. 27 H. 8. 3. 21 H. 7. 17. 37 H. 6. 5. 38 H. 6. 25. (Saund. 142. S. C. 1 Leo. 81. S. C. Bayn. 40. Sid. 141.) 21 H. 7. 25. 1 E. 4. 4. 3 H. 7. 3. 7 H. 7. 2.

See more of this matter, where the plaintife varying from time or place alledged in the count of actions transitory, shall commit no departure.

Vid. Sect. 485.

The plea that containes duplicity or multiplicity of distinct matter to one and the same thing, whereunto severall answers (admitting each of them to be good) are required, is not allowable in law. And this rule you see extendeth to pleas perpetuall or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them; and hereof ancient writers * speake notably: *Sicut actor una actione debet experiri saltem illâ durante, sic oportet tenentem una exceptione, dum tamen peremptoria (quod de dilatoriis non est tenendum); quia si liceret pluribus uti exceptionibus peremptoriis simul & semel, sicut fieri poterit in dilatoriis, sit sequeretur, quod si in probatione unius defecerit, ad aliam probandam possit habere recursum, quod non est permissibile, nec magis quam aliquem se defendere duobus baculis in duello, cum unus tantum sufficiat.*

Pl. Com. 132, 142. * Fleta li. 6. ca. 35. Bracton li. 5. fol. 400.

But where the tenant or defendant may pleade a generall issue, thereupon the generall issue pleaded, he may give in evidence as many

many diſtinct matters to barre the action or right of the demandant or plaintife, as he can (1).

17 E. 3. 73. (Doc. Pla. 135.) A ſpeciall verdict may containe double or treble matter; and therefore in thoſe caſes the tenant or defendant may eyther make choice of one matter, and to plead it to barre the demandant or plaintife, or to plead the generall iſſue, and to take advantage of all; or he may plead to part one of the pleas in barre, and to another part another plea; and his concluſion of his plea ſhall avoide doubleneſſe, and hereby neither the court nor the jury is ſo much inveigled, as if one plea ſhould containe divers diſtinct matters. And if the tenant make choice of one plea in barre, and that be found againſt him, yet he may reſort to an action of an higher nature, and take advantage of any other matter. And the law in this point is by them that underſtand not the reaſon thereof miſliked, ſaying, *Nemo prohibetur pluribus defenſionibus uti.*

39 H. 6. 27.

(Ante 139. a.)

And it is worthy of obſervation, that in the raignes of *Edward* the ſecond, *Edward* the firſt, and upwards, the pleadings were plain and ſenſible, but nothing curious, evermore having chiefe reſpect to matter, and not to formes of words, and were often holpen with a *quæſitum eſt*, and then the queſtions moved by the court, and the anſwers by the parties were alſo entred into the rolle. But even in thoſe dayes the formes of the regiſter of originall writs were then punctually obſerved, and matters in law excellently debated and reſolved; and where any great difficulty was, then it was reſolved by all the judges and ſages of the law (who were for matters in law called *concilium regis*) and their aſſembly and reſolution was entred into the rolle. As for example, in the great caſe in a *quare impedit*, between the king and the prior of Worceſter, concerning an appropriation, whether it were a mortmaine, the record ſaith, *ad quem diem venit prædictus prior per attornatum ſuum, &c. Et examinatis et intellectis recordo et proceſſu coram toto concilio tam theſaurario et baronibus de ſcaccario quàm cancellario, ac etiam juſticiariis de utroque banco inſpectâ cauſâ, pro quâ, pro domino rege dicunt, quòd ad ipſum regem pertinet præſentare, &c. conſideratum eſt, &c.* For in thoſe dayes though the chancellor and treaſurer were for the moſt part men of the church, yet were they expert and learned in the lawes of the realme.

Hill. 32 E. 1. cor. Reg. in fine rotul.

[304. b.]

As for example, in the time of the Conqueror, *Egelricus epiſcopus Ciceſtrenſis vir antiquiſſimus, et in legibus ſapientiſſimus*, as elſewhere I have ſaid.

[a] Ockham, fo. 17. [a] *Nigellus epiſcopus Elienſis Hen. 1. theſaurarius in temporibus ſuis incomparabilem habuit ſcaccarii ſcientiam, et de eâdem ſcripſit optimè.*

[b] Paſch. 5 R. 2 cor. Rege. [b] *Henricus Cant. epiſcopus, H. Dunelm' epiſcopus, Willielmus Elienſis epiſcopus, G. Roffenſ. epiſcopus.*

[c] 1 H. 3. Rot. pat. Bract. ſæpe. [c] *Martinus de Pateſhul clericus decanus Divi Pauli London' conſtitutus fuit capitalis juſtic' de banco, quia in legibus hujus regni peritiſſimus.*

[d] Bract. ſæpe. [d] *Will'us de Raleigh clericus juſticiarius domini regis.*

[e] 8 E. 3. 31. [e] *Johannes epiſcopus Carlienſis tempore H. 3.*

Robertus Paſſelewe epiſcopus Ciceſtrenſis tempore H. 3.

[f] Rot. pat. 24 H. 3. [f] *Robertus de Lexintonio clericus conſtitutus capitalis juſtic' de banco.*

Johannes

(1) [See Note 268.]

[g] *Johannes Britton epiſcopus Hereford.*

[h] *Henricus de Stanton clericus conſtitutus fuit capitalis juſticiarius ad placita;* with many others. And ſo were divers and many of the nobility, who when matters of great difficultie were brought into the upper houſe of parliament by writ of error, adjournement, or other parliamentary courſe, did by the aſſiſtance of the reverend judges, who ever attended in that court, judge and determine the ſame as by former and ancient records, and ſpecially by the ſaid record of 5 *R.* 1. doe manifeſtly appeare; and therefore the lords of parliament were called for thoſe purpoſes, *concilium regis;* and like to the aforementioned record there be very many.

[g] Libere jus de legibus extat ſcript. temp. E. II.

[h] Rot. pat. 17 E. 2. m. 11

In the reigne of *Edward* the third, pleadings grew to perfection both without lamenеſſe and curioſity; for then the judges and profeſſors of the law were excellently learned, and then knowledge of the law flouriſhed, the ſerjeants of the law, &c. drew their owne pleadings; and therefore truly ſaid that reverend juſtice *Thirning*, in the raigne of *H.* 4. that in the time of *Edw.* 3. the law was in a higher degree than it had been any time before; for (ſaith he) before that time the manner of pleading was but feeble in compariſon of that it was afterward in the raigne of the ſame king.

12 H. 4. 3.

In the time of *Henrie* the Sixth the judges gave a quicker eare to exceptions to pleadings, than either their predeceſſors did, or the judges in the raigne of *Edw.* the fourth, when our author flouriſhed, or ſince that time have done, giving no way to nice exceptions, ſo long as the ſubſtance of the matter were ſufficiently ſhewed. And as in the raigne of king *Edward* the third, by an act of parliament* it is provided, that counts or declarations ſhould not abate ſo long as the matter of the action be fully ſhewed in the declaration and writ; ſo ſince our author wrote, in the raigne of queen *Elizabeth*, proviſion is made, that after demurrer the judges ſhall give judgement according to the right of the cauſe and matter in law, without regarding any imperfection, defect, or want of forme in any writ, returne, plaint, declaration, or other pleading or courſe of proceeding whatſoever, except ſuch as the party demurring ſhall ſpecially ſhew. In which acts appeales and indictments of felony, murder, or treaſon concerning man's life, and the forfeiture of his lands and goods, are excepted. An excellent and a profitable law, concurring with the wiſedome and judgement of ancient and latter times, that have diſallowed curious and nice exceptions tending to the overthrow or delay of juſtice; *apices juris non ſunt jura:* yet it is good for a learned profeſſor to make all things plain and perfect, and not to truſt to the after aide or amendment by force of any ſtatute, leſt his client's cauſe matcheth not therewith; and as it is a phyſicke for the health of a man's body, ſo it is in remedies for the ſafety of a man's cauſe. In law, *præſtat cautela quàm medela.*

(Hob. 332. Ante 72. a.)

*36 E. 3. ca. 15. 46 E. 3. 21. Dy. 299. Li. 8. fo. 161. Lib. 10. fo. 131. (Doc. Pla. 116.) Li. 10. fo. 88. Pl. Com. 421.

But now let us returne to our author.

4 E. 3. 19. 9 E. 3. 1. 12 E. 4. 11. 16 E. 3. fines 4. 6 Eliz. Dier 230.

And here is the seventh case wherein the release and confirmation doth agree; for if there be lord and tenant by fealty and twenty shillings rent, the lord may release all his right in the seigniorie or in the tenancie, saving fealtie and ten shillings rent; but he cannot save a new kinde of service, for he may aswell abridge his services upon a release as upon a confirmation. And as there is required privitie when the lord abridgeth the services of his tenant by his confirmation; so must there be also, when the lord by his release abridgeth the services of his tenant. And therefore the lord paramount cannot release to the tenant peravaile saving to him part of his services, but the saving in that case is void (1).

(Ant. 47. a.) (Plo. 563. b.) Britton f. 57. 177. 40 E. 3. 21. 47, 48. 18 E. 3. 26. 50 Ass. 6. 14 H. 4. 8.

"Et rendra rien a son seignior forsque ceo que est comprise, &c." Which words are thus to be understood; that the tenant shall not render any more rent or annuall service to the lord than is contained in the deed; but other things notwithstanding the said confirmation the tenant shall yeeld to the lord, as releefe, ayde *pur file marier*, and ayde *pur faire fitz chivaler*, because these are incidents to the tenure that remaine, and shall not be discharged without speciall words, by the generall words of all other actions, services and demands. And so if a man hold of me by knight's service, rent, suit, &c. and I release to him all my right in the seigniorie, excepting the tenure by knight's service, or confirme his estate to hold of me by knight's service only for all manner of services, exactions, and demands; yet shall the lord have ward, marriage, releefe, ayde *pur file marier, et pur faire fitz chivaler*, for these be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed, reserving two shillings rent *a luy et ses heires pro omnibus et omnimodis servitiis, exactionibus secularibus et cunctis demandis*, if the donee die his heire of full age, the donor shall have no releefe, because in the originall deed of the gift in taile it is expresly limited, that by the service of two shillings rent he shall be quite of all demands (and releefe lieth in demand); and by reason of those words, say they, there cannot any releefe become due; but some doe hold the contrary in that case.

(Ant. 76. a.)

13 R. 2. tit. avowrie 89. Nota dictum. Fitzh.

(Ant. 23. a.)

Sect. 539.

*MES si le seignior voile per fait de confirmation, que le tenant en ceste cas doit render a luy un esperver ou un rose annualment a tiel feast, &c. ceste * confirmation est voide, pur ceo que il reserva a luy un novel chose que ne fuit parcel de ses services devant la confirmation: et issint le seignior poit bien per tiel confirmation abridger les services † per queux le tenant tient de luy,*

BUT if the lord will by his deed of confirmation, that the tenant in this case shall yeeld to him a hawke or a rose yearly at such a feast, &c. this confirmation is void, because hee reserveth to him a new thing which was not parcell of his services before the confirmation; and so the lord may well by such confirmation abridge the services by which [306. a.]

* *confirmation—reservacion*, L. and M. and Roh.

† *per queux le tenant tient de luy*, not in L. and M. nor Roh.

(1) [See Note 269.]

luy, mes il ne poit reſerver a luy novel ſervices.

which the tenant holdeth of him, but hee cannot reſerve to him new ſervices.

THIS upon that which hath beene ſaid before in the next preceding Section is evident, and needeth no further explication.

Sect. 540.

*ITEM, ſi ſoit ſeignior, ‡ meſne, et tenant, et le tenant eſt un abbe, que tient de meſne per certaine ſervice annualment, le quel n'ad aſcun cauſe § d'aver acquitance envers ſon meſne, pur porter briefe de meſne, ‖ &c. en ceſt cas, ſi le meſne confirma l'eſtate que l'abbe ad en la terre, a aver et tener la terre a luy et a ſes ſucceſſors en frankalmoigne, &c. en ceſt cas le confirmation eſt bone, et adonques l'abbe tiendra de le meſne en frankalmoigne. Et la cauſe eſt, pur ceo que, nul novel ſervice eſt reſerve, car touts les ſervices eſpecialment ſpecifies ſont extincts, et nul rent eſt reſerve ¶ al meſne, forſque ** que l'abbe tient de luy la terre, et ceo fuſt †† il devant la confirmation; car celuy que tient en frankalmoigne ne doit faire aſcun corporall ſervice; iſſint ‡‡ que per tiel confirmation il appiert, que le meſne ne reſerva a luy aſcun novel ſervice, mes que les tenements ſerront tenus de luy come ceo fuit devant.*

[306. b.] *Et en ceſt caſe l'abbe avera un briefe de meſne, s'il ſoit diſtreine en ſon default, per force de le dit confirmation, lou per caſe il ne puiſſoit aver * un briefe adevant, &c.*

ALSO, if there be lord, meſne, and tenant, and the tenant is an abbot, that holdeth of the meſne by certaine ſervices yearly, the which hath no cauſe to have acquitance againſt his meſne, for to bring a writ of meſne, &c. in this caſe, if the meſne confirme the eſtate that the abbot hath in the land, to have and to hold the land unto him & his ſucceſſors in frankalmoigne, or free almes, &c. in this caſe this confirmation is good, and then the abbot holdeth of the meſne in frankalmoigne. And the cauſe is, for that no new ſervice is reſerved, for all the ſervices ſpecially ſpecified bee extinct, and no rent is reſerved to the meſne, but the abbot ſhall hold the land of him as it was before the confirmation; for he that holdeth in frankalmoigne ought to doe no bodily ſervice; ſo that by ſuch confirmation it appeareth, the meſne ſhall not reſerve unto him no new ſervice, but that the lands ſhall bee holden of him as it was before. And in this caſe the abbot ſhall have a writ of meſne, if hee bee diſtrained in his default, by force of the ſaid confirmation, where per caſe hee might not have ſuch a writ before.

HERE our author having ſeene the former bookes putteth his caſe, that the meſne maketh the confirmation to hold in frankalmoigne, and not the lord paramount.

* 4 E. 3. 19. 22 E. 3. 15. the lord Wake's caſe. 10 E. 3. 2. 15 E. 3. confirmat. 8.

‡ *meſne—meſne*, L. and M. but not in Roh.
§ *per cas* added L. and M. and Roh.
‖ *&c.* not in L. and M. nor Roh.
¶ *al meſne* not in L. and M. nor Roh.
** *que* not in L. and M.
†† *il—a lui*, L. and M. and Roh.
‡‡ *que* not in L. and M. nor Roh.
* *un—tiel*, L. and M. and Roh.

4 E. 3. 19, 20. F. N. B. 136. h. & q. 4 E. 4. 35. 31 E. 1. Meſne 55. 11 E. 3. Avowrie 100. 22 E. 3. 18. b.

" *Et en ceſt caſe l'abbe avera brieſe de meſne.*" Here is to bee noted, that upon a confirmation to hold in freealmoigne there lyeth a writ of meſne, albeit the cauſe of acquitall beginne after the ſeignior. And ſo upon ſuch a confirmation the tenant ſhall have, *contra formam feoffamenti.*

30 E. 3. 13. 16 H. 3. Avowrie 243. (9 Rep. 130.)

Sect. 541.

ITEM, ſi jeo ſue ſeiſie d'un villein come de villein en gros, et un auter luy prent hors de ma poſſeſſion, enclaimant luy d'eſtre ſon villeine † la ou il n'avoit uſcun droit d'aver luy come ſon villeine, et puis jeo confirma a luy l'eſtate que il ad en mon villeine, ceſt confirmation ſemble void, pur ceo que nul poit aver poſſeſſion de un home come de villeine en groſſe, ſi non celuy que ad droit de luy aver come ſon villein en groſſe. Et iſſint entant que celuy a que le confirmation fuit fait, ne fuit ſeiſie de luy come de ſon villeine a le temps de confirmation fait, tiel confirmation eſt void.

ALSO, if I be ſeiſed of a villeine as of a villeine in groſſe, and another taketh him out of my poſſeſſion, clayming him to bee his villein there where hee hath no right to have him as his villeine, and after I confirme to him the eſtate which hee hath in my villeine, this confirmation ſeemeth to be voide, for that none may have poſſeſſion of a man as of a villeine in groſſe, but he which hath right to have him as his villeine in groſſe. And ſo inaſmuch as hee to whom the confirmation was made, was not ſeiſed of him as of his villeine at the time of the confirmation made, ſuch confirmation is void.

45 E. 3. 10. 30 H. 6. tit. barre 59. Regiſtrum 102. 1 H. 6. cap. 5. (Poſt. 323. a.) Brooke tit. propertie 28. (Sect. 589, 590, 591.)

HERE is to be obſerved a diverſity betweene the cuſtodie of the body of a ward within age, and a right of inheritance in the body of a villeine in groſſe; for a man may bee put out of poſſeſſion of the cuſtodie of his ward, but not of his villeine in groſſe, no more than a man can bee of his priſoner which he hath taken in warre.

[a] Bracton lib. 2. 59. b. 24 E. 3. tit. diſcont. 16. 42 E. 3. 18. 40 E. 3. 17. 48 E. 3. 4. 9 E. 4. 38. Dier. 10 Eliz. Growche's caſe.

Alſo of things that are in grant, as rents, commons, and the like, it is at the election of the party whether hee will be diſſeiſed of them or no, as ſhall bee ſaid after in his proper place (1). But of a villeine in groſſe he cannot at all be diſſeiſed [a]. *Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei vel juris unde fieri debet confirmatio, & eadem modo niſi ille cui confirmatio fit, ſit in poſſeſſione.*

And materially doth *Littleton* put his caſe of a villeine in groſſe; for of a villeine regardant to a mannor, the lord may be put out of poſſeſſion; for by putting him out of poſſeſſion of the mannor, which is the principall, hee may likewiſe bee put out of poſſeſſion of the villeine regardant, which is but acceſſory. And by the recovery of the mannor the villeine is recovered. But if another doth take away my villeine in groſſe or regardant, he gaineth no poſſeſſion

† *la ou il n'avoit uſcun droit d'aver luy come ſon villeine*, not in L. and M. nor Roh.

(1) Sec ant. 239. note 1.

poſſeſſion of him. And this doth well appeare by the writ of *nativo habendo*, for that writ is not brought againſt any perſon in certaine (becauſe no man can gaine the poſſeſſion of him). [307. a.] But the writ is to this effect: *Rex vic' ſalutem. Præcipimus tibi, quòd juſtè et ſine dilatione habere facias A. B. nativum et fugitivum ſuum, &c. ubicunque inventus fuerit, &c. et prohibemus ſuper forisfacturam noſtram ne quis eum injuſtè detineat;* ſo as detaine him one may, but to poſſeſſe himſelfe of him, and to diſpoſſeſſe the lord, he cannot. (Ant. 303. a.)

And if a man might have beene diſpoſſeſſed of a villeine in groſſe, or of a villeine regardant (unleſſe he be diſpoſſeſſed of the mannor alſo, as hath beene ſaid), the law would have given a remedie againſt the wrong doer, as the law doth in the caſe of a ward.

Now, ſeeing it doth appeare by our bookes [a] (and by *Littleton* himſelfe by implication ſpeaking only of a villeine in groſſe) that if a man be diſſeiſed of the mannor whereunto the villeine is regardant, he is out of poſſeſſion of his villeine, and ſo an advowſon appendant, and the like. Hereby (*Littleton* putting his caſe of a villeine in groſſe) and by divers authorities a point controverted in our bookes [*] is reſolved, viz. that by the grant of the mannor without ſaying *cum pertinentiis*, the villeine regardant, advowſon appendant, and the like, doe paſſe: for if the diſſeiſor ſhall gaine them as incidents to the mannor, whoſe eſtate is wrongfull, *à multò fortiori* the feoffee, who commeth to his eſtate by lawfull conveyance, ſhall have them as incidents. But where the entrie of the diſſeiſee is lawfull, he may ſeiſe the villeine regardant, or preſent to the advowſon, &c. before he enter into the mannor: otherwiſe it is where his entrie is not lawfull; and ſo are the ancient authors [b] to be intended (1).

[a] Bracton, fol. 243. Britton, fol. 126. (5 Rep. 11. b. Ant. 77. a. 121. b.)

[*] 9 E. 4. 38. 3 H. 4. 15. 18 E. 3. 44. 16 E. 3. Quar. Imp. 146. 19 R. 2. Treſp. 255. 19 H. 6. 33. 21 H. 6. 9. 33 H. 6. 33. 5 H. 7. 36. 38. 10 H. 7. 9.

F. N. B. 33. 9. 22 H. 6. 33. per Moyle. 30 E. 3. 31. 39 E. 3. 21. 43 E. 3. 12. (Plowd. 258. a. Ant. 122. b. Poſt. 349. b. 363. b.)

[b] Bracton, fol. 242, 243. Britton, fol. 128. Fleta, &c.

Sect. 542.

MES en ceſt cas, ſi tiels parols fueront en le fait, * *&c.* Sciatis me, dediſſe et conceſſiſſe † tali, &c. talem villanum meum, *c'eſt bone; mes ceo altera per force et voy de grant, et nemy per voy de confirmation, &c.*

BUT in this caſe, if theſe words were in the deed, &c. *Sciatis me dediſſe et conceſſiſſe tali, &c. talem villanum meum*, this is good; but this ſhall enure by force and way of grant, and not by way of confirmation, &c.

HERE it is to be obſerved, that a man hath an inheritance in a villeine, whereof the wife of the lord ſhall be endowed, as hath beene ſaid; for in him a man may have an eſtate in fee or fee taile for life or yeeres. And therefore *Littleton* is here to be underſtood, that in the grant there were theſe words (*his heires*) or elſe nothing paſſed but for life, as of other things that lie in grant.

2 H. 6. F. N. B. 77. a. b.

24 E. 3. Diſcont. 16.

* *&c.* not in L. and M. nor Roh. † *tali* not in L. and M. nor Roh.

(1) See the Chapter on Villenage.

Sect. 543.

ET ‡ aſcun foits ceux verbs dedi et conceſſi ureront per voy d'extinguiſhment del choſe done ou grant; ſicome un tenant tient de ſon ſeignior per certeine rent, et le ſeignior granta per ſon fait a le tenant et a ſes heires le rent, &c. ceo urera a le tenant per voy d'extinguiſhment, car per cel grant le rent eſt extinct, &c.

AND ſometimes theſe verbes *dedi et conceſſi* ſhall enure by way of extinguiſhment of the thing given or granted; as if a tenant hold of his lord by certaine rent, and the lord grant by his deed to the tenant and his heires the rent, &c. this ſhall enure to the tenant by way of extinguiſhment, for by this grant the rent is extinct, &c.

8 E. 3. 16. & 3 Aſſ. 7. And this grant of the rent ſhall enure by way of releaſe.

(2 Roll. 406.)

Sect. 544. [307. b.]

*EN meſme le manner eſt lou * un ad un rent charge hors de certaine terre, et il graunta al tenant de la terre le rent charge, &c. Et la cauſe eſt, pur ceo que appiert, per les parols del grant, que le volunt le donor eſt, que le tenant avera le rent, &c. Et entant que il ne puit aver ne perceiver aſcun rent hors de ſon terre demeſne, pur ceo le fait ſerra intendue et pris pur le pluis advantage et availe pur le tenaunt que puit eſte pris, et ceo eſt per voy d'extinguiſhment.*

IN the ſame manner it is where one hath a rent charge out of certaine land, and hee grant to the tenant of the land the rent charge, &c. And the reaſon is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant ſhall have the rent, &c. And inaſmuch as hee cannot have or perceive any rent out of his owne land, therefore the deed ſhall be intended and taken for the moſt advantage and availe for the tenant that it may be taken, and this is by way of extinguiſhment.

34 H. 6. fol. 41. (Ante 280. a.) BUT if the grantee of the rent-charge granteth it to the tenant of the land and a ſtranger, it ſhall be extinguiſhed but for the moitie: and ſo it is of a ſeigniorie.

Sect. 545.

ITEM, ſi jeo leſſa terre a un home pur terme d'ans, et puis jeo confirma ſon eſtate ſans pluis parolx mitter en le fait, per cel il n'ad pluis greinder eſtate que pur terme d'ans, ſicome il avoit adevant.

ALSO, if I let land to a man for terme of yeares, and after I confirme his eſtate without putting more words in the deed, by this he hath no greater eſtate than for terme of yeares, as hee had before.

‡ *Et—item*, L. and M. and Roh.

* *un—home*, L. and M. and Roh.

Sect. 546.

MES ſi jeo releſſa a luy mon droit que jeo aye en la terre ſans plus † parols mitten en le fuit, il ad eſtate de franktenement. ‡ Iſſint poyes entend, mon fits, divers grands diverſities perenter releaſes et confirmations.

BUT if I releaſe to him all my right which I have in the land without putting more words in the deed, hee hath an eſtate of freehold (1). So thou maiſt underſtand (my ſonne) divers great diverſities betweene releaſes and confirmations.

In theſe two Sections is the ſeventh caſe wherein a releaſe and confirmation doe differ.

[308. a.]

Sect. 547.

(Ant. 296)

ITEM, ſi jeo eſteant deins age leſſa terre a un auter pur terme de xx. ans, et puis il graunte le terre a un auter pur terme de x. ans, iſſint il granta forſque parcel de ſon terme: en ceſt caſe quant jeo ſue de pleine age, ſi jeo releſſa al grauntee de mon leſſee, &c. ceſt releaſe eſt voyd, pur ceo que il n'y ad aſcun privitie perenter luy et moy, &c. Mes ſi jeo confirme ſon eſtate, donque ceſt confirmation eſt bone. Mes ſi mon leſſee graunta tout ſon eſtate a un auter, donques mon releaſe fuit a le grantee eſt bone et effectual.

ALSO, if I being within age let land to another for terme of xx. yeares, and after he granteth the land to another for term of x. years, ſo hee granteth but parcell of his terme: in this caſe when I am of full age, if I releaſe to the grantee of my leſſee, &c. this releaſe is void, becauſe there is no privitie betweene him and me, &c. But if I confirme his eſtate, then this confirmation is good. But if my leſſee grant all his eſtate to another, then my releaſe made to the grantee is good and effectuall (1).

HERE are two things to be obſerved: Firſt, that the leaſe of an enfant in this caſe is not void but voidable. Secondly, this is the eighth caſe put by *Littleton*, wherein the releaſe and confirmation doe differ. 7 E. 4. 6. b. 18 E. 4. 2. 9 H. 7. 24. (Cro. Jac. 320. Sid. 42. 1 Roll. 729, 730.)

† *parols* not in L. and M. nor Roh.

‡ *et* added in L. and M. and Roh.

(1) [See Note 270.]

[308. a.]

(1) [See Note 271.]

(Sid. 235.)
(Mo. 30.)

Sect. 548.

ITEM, ſi home granta un rent charge iſſuant hors de ſon terre a un auter pur terme de ſon vie, et puis il confirma ſon eſtate en le dit rent, a uver et tener a luy en fee taile ou en fee ſimple; ceſt confirmation eſt void quant a enlarger ſon eſtate, pur ceo que celuy que confirme n'avoit aſcun reverſion en le rent.

ALSO, if a man grant a rent-charge iſſuing out of his land to another for terme of his life, and after hee confirmeth his eſtate in the ſaid rent, to have and to hold to him in fee taile or in fee ſimple; this confirmation is void as to inlarge his eſtate, becauſe hee that confirmeth hath not any reverſion in the rent.

(2 Roll. 415.)
21 E. 3. 47.
15 E. 4. 8. b.
Pl. Com. 35.
8 H. 4. 19.
(Ant. 148. a. Poſt. 387. a.)

HERE the diverſitie is apparant, betweene a rent newly created and a rent in *eſſe*: which needeth no explication. Only this is to be obſerved, that *Littleton* intendeth his deed of confirmation not to containe any clauſe of diſtreſſe; for otherwiſe, as to the confirmation the deed is void, but the clauſe of diſtreſſe doth amount to a new grant, as in the Chapter of Rents hath beene ſaid.

(Poſt. 366. a. Finch 234.)

Sect. 549.

*MES ſi home ſoit ſeiſie en fee de rent ſervice ou de rent charge, et il grant le rent a un auter pur terme de vie, et le tenant atturna, et puis il confirma l'eſtate de le grantee en fee taile, ou en fee ſimple, ceſt confirmation eſt bone, quant a enlarger ſon eſtate ſolonques les parols le confirmation, pur ceo que celuy que confirmaſt *al temps de confirmation avoit un reverſion del rent.*

BUT if a man be ſeiſed in fee of rent ſervice or rent charge, and he grant the [308. b.] rent to another for life, and the tenant attorneth, and after hee confirmeth the eſtate of the grantee in fee taile, or in fee ſimple, this confirmation is good, as to enlarge his eſtate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reverſion of the rent.

HERE is the eighth caſe wherein the releaſe and confirmation doth agree: and it is here to be obſerved, that to the grant of the eſtate for life, *Littleton* doth put an attornement, becauſe it is requiſite; but to the confirmation to the grantee of the rent to enlarge his eſtate, there is none neceſſary, and therefore he putteth none: but of this more ſhall be ſaid in the Chapter of Attornement, *Sect.* 556, 557.

* *l'eſtate* added L. and M.

Sect. 550.

MES en cas avantdit lou home graunt un rent charge a un auter pur terme de vie, s'il voile que le grantee averoit eſtate en le taile, ou en fee, il covient que le fait de grant del rent charge pur terme de vie, ſoit ſurrender ou cancell, et donques de faire un novel fait d'autiel rent charge, a aver et perceiver a le grantee en le taile ou en fee, &c. Ex paucis † plurima concipit ingenium.

BUT in the caſe aforeſaid where a man grants a rent charge to another for terme of life, if he will that the grantee ſhould have an eſtate in taile, or in fee, it behoveth that the deed of grant of the rent charge for terme of life be ſurrendred or cancelled, and then to make a new deed of the like rent charge, to have and perceive to the grantee in tayle or in fee, &c. *Ex paucis plurima concipit ingenium.*

"*SURRENDER ou cancel.*" (1) Note by cancellation of the deed the rent which lieth only in grant ceaſeth (as here it appeareth) as well as by the ſurrender. And the reaſon wherefore (if the grantor make a new grant of the rent, and not enlarge it by way of confirmation, as *Littleton* muſt be intended) the deed ſhould be ſurrendred or cancelled, is leſt the grantor ſhould be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath beene ſaid, the grantor may grant to the grantee for life and his heires, that he and his heires ſhall diſtreine for the rent, &c. and this ſhall amount to a new grant, and yet amount to no double charge, whereof you may ſee before in the Chapter of Rents.

Vid. Sect. 636. (Cro. Car. 399. Ant. 148. a. 225. b. 10 Rep. 66. Plowd. 237. a. Poſt. 338. 1 Ven. 297.)

† *plurima concipit ingenium—dicis*, &c. E. and M.

(1) See ant. 226, note 2.

Chap. 10. Of Attornement. Sect. 551. [309. a.]

*ATTORNEMENT eſt, come ſi ſoit ſeignior et tenant, et le ſeignior voile granter per ſon fait les ſervices de ſon tenant a un auter pur terme d'ans, ou pur terme de vie, ou en taile, ou en fee, il covient que le tenant atturna al grauntee en le vie le grantor, per force et vertue del grant, ou auterment le grant eſt void. Et atturnement eſt nul auter en effect, forſque quant le tenant ad oye del grant fait per ſon ſeignior, que meſme le tenant agrea per parol a le dit grant, ſicome adire a le grauntee, Jeo moy agree a le grant fait a vous, * &c. ou, Jeo, ſue † bien content de le graunt fuit a vous; mais le pluis common atturnement eſt, adire, ‡ Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne voſtre tenant, &c. ou ‖ liverer al grantee un denier, ou un maile, ou un farthing, per voy d'attornement.*

ATTORNEMENT is, as if there bee lord and tenant, and the lord will grant by his deed the ſervices of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant muſt attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwiſe the grant is void. And attornement is no other in effect, but when the tenant hath heard of the grant made by his lord, that the ſame tenant do agree by word to the ſaid grant, as to ſay to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the moſt common attornment is, to ſay, Sir, I attorne to you by force of the ſaid grant, or I become your tenant, &c. or to deliver to the grantee a pennie, or a halfepennie, or a farthing, by way of attornement.

Bracton, lib. 2. fol. 81. Britt. f. 105. b. 176, et 177. Fleta, lib. 3. cap. 6. (1 Roll. Abr. 293.) (1 Rep. 68.)

"*ATTORNMENT*" is an agreement of the tenant to the grant of the ſeigniorie, or of a rent, or of the donee in tayle, or tenant for life or yeeres, to a grant of a reverſion or remainder made to another. It is an ancient word of art, and in the common law ſignifieth a torning or attorning from one to another. Wee uſe alſo *attornamentum* as a Latine word, and *attornare* to attorne. And ſo *Bracton* [a] uſeth it: *Item videndum, eſt ſi dominus attornare poſſit alicui homagium et ſervitium tenentis ſui contra voluntatem ipſius tenentis, et videtur quòd non.*

[a] Bracton, lib. 2. fo. 81. b. Fleta. Britton, ubi ſupra.

Bracton, lib. 2. fo. 81. b. Britton, ubi ſupra.

And the reaſon why an attornment is requiſite, is yeelded in old bookes to be, *Si dominus attornare poſſit ſervitium tenentis contra voluntatem tenentis, tale ſequeretur inconveniens, quòd poſſit eum ſubjugare capitali inimico ſuo, et per quod teneretur ſacramentum fidelitatis facere ei qui eum damnificare intenderet* (1).

Vide Litt. fol. 128. 11 H. 7. 19. Lib. 1. fol. 104, 105. Shelley's caſe.

"*Il covient que le tenant attorna al grantee en la vie del grantor, &c.*" And ſo muſt he alſo in the life of the grantee; and this is underſtood of a grant by deed. And the reaſon hereof is, for that every grant muſt take effect as to the ſubſtance thereof in the life both of the grantor and the grantee. And in this caſe if the grantor

* *&c.* not in L. and M. nor Roh.
† *bien* not in L. and M. nor Roh.
‡ *&c.* added in L. and M, and Roh.
‖ *liverer—deliverer*, L. and M. and Roh.

(1) [See Note 272.]

grantor dieth before attornement, the ſeigniorie, rent, reverſion, or remainder deſcend to his heire; and therefore after his deceaſe the attornement commeth too late: ſo likewiſe if the grantee dieth [309. b.] before attornement, an attornement to the heire is void, for nothing deſcended to him: and if he ſhould take, he ſhould take it as a purchaſor, where the heires were added but as words of limitation of the eſtate, and not to take as purchaſors.

40 Aſſ. 19. 34 H. 6. 7. 20 H. 6. 7. (Doc. and Stud. 86. a.) (9 Rep. 84. Sect. 564.)

But if the grant were by fine, then albeit the conuſor or conuſee dieth, yet the grant is good. For by fine levied the ſtate doth paſſe to the conuſee and his heires; and the attornment to the conuſee or his heires at any time to make privitie to diſtraine is ſufficient. But all this is to be taken as *Littleton* underſtood it, viz. of ſuch grants as have their operation by the common law. For ſince *Littleton* wrote, if a fine be levied of a ſeigniorie, &c. to another to the uſe of a third perſon and his heires, he and his heires ſhall diſtraine without any attornment, becauſe he is in by the ſtatute of 27 *H.* 8. *cap.* 10. by transferring of the ſtate to the uſe, and ſo he is in by act in law.

34 H. 6. 7. 20 H. 6. 7. Bracton, lib. 2. fol. 81, 82. acc. Lib. 6. fol. 68. Sir Moyle Finche's caſe.

And ſo it is, and for the ſame cauſe, if a man at this day by deed indented and inrolled according to the ſtatute, bargaineth and ſelleth a ſeigniorie, &c. to another, the ſeigniorie ſhall paſſe to him without any attornement; and ſo it is of a rent, a reverſion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and leſſees much altered concerning attornement ſince *Littleton* wrote.

(2 Cro. 193. Poſt. 321. 6 Rep. 68.) 27 H. 8. cap. 16. Vide Sect. 584.

But if the conuſee of a fine before any attornement by deed indented and inrolled, bargaineth and ſelleth the ſeigniorie to another, the bargainee ſhall not diſtraine, becauſe the bargainor could not diſtraine. *Et ſic de ſimilibus*; for *nemo poteſt plus juris ad alium transferre quàm ipſe habet*. *Vide Sect.* 149. where upon a recovery, the recoveror ſhall diſtraine and avow without attornement.

(Ant. 104. b. Poſt. 321. b. 5 Rep. 113.) Lib. 6. ubi ſupra. Vide Sect. 149.

A grant to the king, or by the king to another, is good without attornement, by his prerogative.

49 E. 3. 4. 34 H. 6. 8. 6 E. 4. 13. (Poſt. 314. b. 1 Roll. Ab. 294.

"*Attornement eſt nul outer en effect, &c.*" It is to be underſtood that there be two kinde of attornements, viz. an attornement in deed or expreſſe, and an attornement in law or implicite. Of attornement expreſſe or in deed *Littleton* ſpeaketh here, and of attornement in law he ſpeaketh after in this chapter. And to both theſe kinds of attornements there is an incident inſeparable, that is, that the tenant hath notice of the grant; for (an attornement being an agreement or conſent to the grant, &c.) he cannot agree or conſent to that which he knoweth not. And the uſuall pleading is, to which grant the tenant attorned. And therefore if a bayly of a mannor who uſed to receive the rents of the tenants, purchaſe the mannor, and the tenants having no notice of the purchaſe continue the payment of the rents to him, this is no attornement. So if the lord levie a fine of the ſeigniorie, and by fine take backe an eſtate in fee, the tenant continueth the payment of the rent to the firſt conuſor without notice of the fines, this is no attornement. But it is to be knowne, that there be two kinde of notices, viz. a notice in deed or expreſſe, whereof *Littleton* here ſpeaketh, when he ſaith, that the tenant agreeth to the grant, and a notice in law or implied, whereof *Littleton* hereafter ſpeaketh in this chapter.

Sect. 564.) 1 Rep. Alton Wood's caſe. 8 Rep. 89. 1 Roll. Rep. 301. 1 Cro. 441. Jones 376.) Lib. 2. fol. 67. b. Tooker's caſe. 13 Eliz. Dier 302. Tooker's caſe ubi ſupra. Lib. 2. Tooker's caſe ubi ſupra.

"*Del*

"*Del grant fait per ſon ſeignior.*" Here is to be ſeene when the thing granted is altered, what becommeth of the attornement.

If there be lord, meſne and tenant, and the meſne grant over his meſnaltie by deed, the lord releaſeth to the tenant; whereby the meſnaltie is extinct, and there is a rent by ſurpluſage, an attornement to the grant of this rent ſecks is good, although the qualitie of that part of the rent is altered, becauſe it is altered by act in law.

If a reverſion of two acres be granted by deed, and the leſſor before attornement levie a fine of one of them, and the tenant attorne to the grantee by deed, this is good for the other acre.

[a] 18 E. 3. tit. Variance, 63. 22 E. 3. 18. Tooker's caſe ubi ſupra. (Poſt. 314.)

[a] If the reverſion be granted of three acres, and the leſſee agree to the ſaid grant for one acre, this is good for all three; and ſo it is of an attornement in law, if the reverſion of three acres be granted, and the leſſee ſurrender one of the acres to the grantee, this attornement ſhall be good for the whole reverſion of the three acres according to the grant.

"*Et le tenant agrea.*" Hereafter in this chapter *Littleton* doth teach what manner of tenant ſhall attorne.

"*Agrea per parol, &c.*" And ſo hee may, and more ſafely by his deed in writing.

39 H. 6. 3. Tooker's caſe ubi ſupra.

"*Sicome adire a le grantee, &c.*" Here is to be ſeene to what manner of grantees the attornement is good. Regularly the attornement muſt be according to the grant, either expreſsly or impliedly. Of the firſt *Littleton* hath here ſpoken.

(Poſt. 313. a. Ant. 52. a. 297. b. 296. a.)

Impliedly, as if a reverſion be granted to two by deed, and the leſſee attorne to one of them according to the grant, this attornement is good, but not to veſt the reverſion only in him to whom attornement is made; but it ſhall enure to both the grantees, for that is according to the grant, and for that it cannot veſt the reverſion only in him to whom the attornement is made. And ſo it is if one grantee dieth, the attornement to the ſurvivor is good.

[310. a.]

Tooker's caſe ubi ſupra. 11 H. 7. 12.

20 H. 6. 7. (Ant. 298. a.)

If the lord grant by deed his ſeignorie to *A.* for life, the remainder to *B.* in fee, *A.* dieth, and then the tenant attorne to *B.* this attornement is void, becauſe it is not according to the grant; for then *B.* ſhould have a remainder without any particular eſtate.

Tooker's caſe ubi ſupra. Pl. Com. 187. 483. (Ant. 187. b.)

If a reverſion be granted to a man and a woman, they are to have moities in law; but if they entermarrie and then attornement is had, they ſhall have no moities (and yet by the purport of the grant they are to have moities), becauſe it is by act in law.

2 R. 2. tit. Attornement 8. Lib. 4. f. 61. Heming's caſe. (Mo. 91. con. 1 Leo. 58.)

If a feme grant a reverſion to a man in fee, and marry with the grantee, the leſſee attorne to the huſband, this is a good attornement in law to the huſband.

If a reverſion be granted by deed to the uſe of *I. S.* and the leſſee hearing the deed read, or having notice of the contents thereof attorne to *ceſty que uſe*, this is an implied attornement to the grantee.

Temps E. 1. Attorn. 22. 18 E. 4. 7. (Ant. 212. b. 312. b. 6 Rep. 68. 5 Rep. Ford's caſe. 1 Roll. Abr. 412. 3 Leo. 17. 4 Leo. 23.)

If a reverſion be granted for life, the remainder in taile, the remainder in fee, the attornement to the grantee for life ſhall enure to them in the remainder, to veſt the remainder in them.

And in thoſe caſes if the tenant ſhould ſay, that I doe attorne to the grantee for life, but that it ſhall not benefit any of them in remainder after his death, yet the attornement is good to them all;

for

for having attorned to the tenant for life, the law (which he cannot controll) doth vest all the remainder. And of this more shall be said hereafter in this chapter.

Littleton here putteth five examples of an expresse attornement, but of them the last is the best, because the eare is not only a witnesse of the words, but the eye of the delivery of the penny, &c. and so there is *dictum et factum*. And any other words which import an agreement or assent to the grant, doe amount to an attornement. And albeit these five expresse attornements be all set down by *Littleton*, to be made to the person of the grantee [*b*], yet an attornement in the absence of the grantee is sufficient; for if he doth agree to the grant either in his presence or in his absence, it is sufficient.

[*b*] Lib. 2. fol. 68. 69. Tooker's case. 28 H. 8. tit. Attornement Dyer 298. a.)

Br. 40. (10 Rep. 52. Cro. Car. 440. 1 Roll. Abr. 300.

Sect. 552.

ITEM, si le seignior graunt le service de son tenant a un home, et puis per un fait portant un darreine date il granta mesmes les services a un auter, et le tenant attorne a le second grantee, ore le dit grauntee ad les services; et coment que apres le tenant voile attorner a le primer grauntee, c'est clerement void, &c.*

ALSO, if the lord grant the service of his tenant to one man, and after by his deed bearing a later date hee grant the same services to another, and the tenant attorne to the second grantee, now the said grantee hath the services; and albeit afterwards the tenant will attorne to the first grantee, this is clearely void, &c.

HERE it is to be observed, that *Littleton* expresseth not what estate is granted, and very materially; for if the former grant were in fee, and the latter grant were for life, and the tenant doth first attorne to the second grantee, he cannot after attorne to the first grantee to make the fee simple passe, for that should not be according to the grant; but in that case the attornement to the first is countermanded. And so it is if a reversion expectant upon an estate for life be granted to another in fee, and after the grantor before attornement confirme the estate of the lessee in taile, the attornement to the grantee for the fee simple is void.

(Cro. Car. 284. 1 Roll. Abr. 300. Ant. 296. a.)

In the same manner, if a reversion upon an estate for yeeres be granted in fee, and the lessor confirme the estate of the lessee for life, he cannot afterwards attorne.

[310. b.] If a feme sole maketh a lease for life or yeares, reserving a rent, and granteth the reversion in fee, and taketh husband, this is a countermand of the attornement.

11 H. 7. 19. 2 R. 2. ubi supra.

Where our author putteth his case of the whole reversion, if two coparceners bee of a reversion, and one of them granteth her moity by fine, the conusee shall have a *quid juris clamat* for the moitie.

P. 3. Eliz. Bend. loes. Hemling's case ubi supra. (1 Roll. Abr. 299.)

If in the case that our author here putteth of severall grantees, if the tenant attorne to both of them, the attornement is void, because it is not according to the grant. If a reversion be granted for life, and after it is granted to the same grantee for yeares, and the lessee attorneth

11 H. 7. 19.

* *dit—second*, L. and M. and Roh.

attorneth to both grants, it is voide for the incertaintie: *à multò fortiori*, if the lord by one deed grant his ſeigniorie to *I.* biſhop of *London* and to his heires, and by another deed to *I.* biſhop of *London* and to his ſucceſſors, and the tenant attorne to both grants, the attornement is void; for albeit the grantee be but one, yet he hath ſeverall capacities, and the grants are ſeverall, and the attornement is not according to either of the grants. (Ant. 190. a. Mo. 84.)

But if *A.* grant the reverſion of *Black-Acre* or *White-Acre*, and the leſſee attorne to the grant, and after the grantee maketh his election, this attornement is good; for albeit the ſtate was incertaine, yet he attorned to the grant in ſuch ſort as it was made: and ſo note a diverſity betweene one grant and ſeverall grants, and obſerve in this caſe an attornement good in expectation, and yet nothing paſſed at the time of the attornement, but by the election ſubſequent.

Sect. 553.

*ITEM, ſi home ſoit ſeiſie de un mannor, quel mannor eſt parcel en demeſne, et parcel en ſervice, s'il voile aliener cel mannor a un auter, il covient que per force del alienation, que touts les tenants que teignont del alienor come de ſon mannor * attornerent al alienee, ou auterment les ſervices demurront continualment en l'alienor, forpriſe tenants a volunt†; car il ne beſoigne que tenants a volunt atturnent ſur tiel alienation, &c.* ‡

ALSO, if a man be ſeiſed of a mannor, which mannor is parcell in demeſne, and parcell in ſervice, if hee will alien this mannor to another, it behooveth that by force of the alienation, all the tenants which hold of the alienor as of his mannor doe attorne to the alienee, or otherwiſe the ſervices remaine continually in the alienor, ſaving the tenants at will; for it needeth not that tenants at will doe attorne upon ſuch alienation, &c.

HERE it is to bee obſerved, that when a man maketh a feoffment of a mannor, the ſervices doe not paſſe, but remaine in the feoffor untill the freeholders doe attorne; and when they doe attorne, the attornement ſhall have relation to ſome purpoſe, and not to other. For albeit the attornement bee made many yeares after the feoffment, yet it ſhall have relation to make it paſſe out of the feoffor *ab initio* even by the liverie upon the feoffment, but not to charge the tenants with any meane arrerages, or for waſte in the meane time, or the like. (Temps E. 2. Attornement. 48 E. 3. 15. (Sid. 310. 312. 373. Ant. 263. a. Poſt. 341. a. 3 Rep. 29. 1 Lee. 208.)

If a reverſion of land bee granted to an alien by deed, and before attornement the alien is made denizen, and then the attornement is made, the king, upon office found, ſhall have the land: for as to the eſtate betweene the parties, it paſſeth by the deed *ab initio* (1). (2 Roll. Abr. 394, 395. Pla. 482. b. 483. a. Ant. 270. b. 279. b.) Paſch. 5 E. 3. coram rege. Suſſex in Theſaur.

If a man plead a feoffment of a mannor, hee need not plead an attornement of the tenants; but (if it be materiall) it muſt be denied or pleaded of the other ſide.

And

* &c. added L. and M. and Roh.

† &c. added in L. and M. and Roh.

‡ *pur ceo que meſmes les terres et tenements que ils teignent a volunte paſſont al alienee per force de tiel alienation*, added in L. and M. and Roh. and in MSS.

(1) [See Note 273.]

And upon consideration had of all the bookes touching this point, whether the services of the freeholders doe passe, wherein there have beene three severall opinions, viz. some have holden that the services doe passe in the right by the livery as parcell of the mannor, but not to avow without attornement, as in the case of the fine. And others have holden, that they both passe in right and in possession to distreine without attornement. And the third opinion is, that in this case the said services passe neither in possession nor in right, but untill attornement remaine continually [311. a.] in the alienor, as *Littleton* here holdeth. And so it was resolved *Pasch.* 15 *Eliz.* betweene *Brasbitch* and *Barwell*, according to the opinion of our author. And I never yet knew any of *Littleton's* cases (albeit I have knowne many of them) to be brought in question, but in the end the judges concurred with our author.

21 E. 3. 47. 34 E. 3. Double Plea. 24. 42 Ass. p. 6. 43 Ass. p. 20. 30 E. 3. 29 E. 3. 26 E. 3. per quæ servicia 21. 8 H. 4. 1. b. 12 H. 4. 20 H. 6. 7. 35 H. 6. 9 E. 4. 33. 13 H. 7. 14. a. 1 H. 7. 31. 4 E. 6. Attornement, Br. 30.

Vid. Hill. 14 Eliz. Rot. 508. in Communi Banco.

And where our author speaketh of the attornement of the freeholders, if the lord make a lease for yeares or for life of a mannor, and the freeholders attorne to the lessee, if after the reversion of the mannor be granted, the attornement of the lessee for yeares or life shall binde the freeholders: for by their former attornement, they have put the attornement into the mouth of the lessees.

9 E. 2. tit. Attornement 18. b. 19 E. 2. ibid. 19. 21 E. 3. 47. 6 H. 5. 12. b. Vid. Lit. Sect. 549 & 556.

"*Forfprise tenant a volunt, &c.*" Here is implied tenant at will or by copie of court roll according to the custom of the mannor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law or by custome shall passe both in right and in possession without any attornement (1).

Sect. 554.

ITEM, si soient seignior en tenant, et le tenant lessa la terre a un auter pur terme de vie, ou dona la terre en le taile savant le reversion a luy, &c. si le seignior en tiel cas granta son seigniory a un auter, il covient que celuy en le reversion atturna al grauntee, et nemy le tenant a terme de vie, ou le tenant en le taile, pur ceo que en ceſt cas celuy en le reversion eſt tenant al seignior, et nemy le tenant a terme de vie, ne le tenant en le taile.

ALSO, if there bee lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in taile saving the reversion to himselfe, &c. if the lord in such case grant his seigniory to another, it behoveth that hee in the reversion attorne to the grantee, and not the tenant for terme of life, or the tenant in taile, because that in this case he in the reversion is tenant to the lord, and not the tenant for terme of life, nor the tenant in taile.

FOR it is a maxime in law, that no man shall attorne to any grant of any seigniorie, rent service, reversion or remainder, but he that is immediately privie to the grantor; and because in this case there is no privitie betweene the lord and the tenant for life, (8 Rep. 42.)

(1) For the difference between seisin and attornement, see Brediman's case, 6 Rep. 56. b.

life, or donee in taile, but only betweene the lord and him in the reverſion; for in this caſe the attornment of him in the reverſion only is good.

"*Sauant le reverſion a luy, &c.*" That is to ſay, without limitation of any remainder over; and this is but to make his opinion plaine as to the point that he putteth it.

Sect. 555.

*EN meſme le manner eſt lou ſont ſeignieur, meſne et tenant, *ſi le ſeignieur voile granter les ſervices del meſne, coment que il ne fait aſcun mention en ſon grant del meſne, uncore il covient que le meſne atturna, † &c. et nemy le tenant peravaile, &c. pur ceo que le meſne eſt tenant a luy, &c.*

IN the ſame manner is it where there are lord, meſne and tenant, if the lord will grant the ſervices of the meſne, albeit hee maketh no mention in his grant of the meſne, yet the meſne ought to attorne, &c. and not the tenant peravaile, &c. for that the meſne is [311. b.] tenant unto him, &c.

This ſtandeth upon the ſame reaſon that the next precedent caſe did.

Sect. 556.

MES auterment eſt lou certaine terre eſt charge d'un rent charge ou rent ſeck; car en tiel caſe ſi celuy que ad le rent charge ceo grant a un auter, il covient que le tenant del franktenement atturna al grantee, pur ceo que le franktenement eſt charge ove le rent, &c. Et en rent charge nul avowrie doit eſtre fait ſur aſcun perſon pur le diſtreſſe priſe, &c. mes il avowera le priſe bone et droiturel, come en terres ou tenements iſſint charges a ſon diſtreſſe, &c.

BUT otherwiſe it is where certaine land is charged with a rent-charge or rent ſecke; for in ſuch caſe if he which hath the rent-charge grant this to another, it behooveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge, no avowrie ought to be made upon any perſon for the diſtreſſe taken, &c. but hee ſhall avow the priſel to bee good and rightfull, as in lands or tenements ſo charged with his diſtreſſe, &c.

(6 Rep. 59. a.) HERE is to be obſerved a diverſitie betweene a rent ſervice and a rent charge, or a rent ſecke; for as to the rent ſervice, no man (as hath beene ſaid) can attorne, but he that is privie; ſo
21 H. 6. 9. b. in caſe of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee, without reſpect of any privitie.
(8 Rep. 67.) And therefore the diſſeiſor onely, in the caſe of a grant of a rent charge, ſhall attorne, becauſe he is (as *Littleton* ſaith) tenant of the freehold; but in caſe of a grant of a rent ſervice, the attornment of a diſſeiſee ſufficeth.

If

* *ſi—a* L. and M. and Roh. † *&c.* not in L. and M. nor Roh.

If there be lord and tenant by homage, fealtie, and rent, the tenant is diſſeiſed, the lord granteth the rent to another, the diſſeiſee attorneth, this is void: but if he had granted over his whole ſeigniorie, the attornement had beene good; and the reaſon of this diverſitie is here given by our author, for that when the rent was granted onely, it paſſed as a rent ſecke, and conſequently the diſſeiſor being terre-tenant, muſt attorne. But when the ſeigniorie is granted, then the diſſeiſee in reſpect of the privitie may attorne. (6 Rep. 39. a.)

"*Covient que le tenant del franktenement, &c.*" And therefore if the tenant of the land charged with a rent charge or a rent ſecke make a leaſe for life, and he that hath the rent charge or rent ſecke granteth it over, the tenant for life ſhall attorne, for he is tenant of the freehold, according to the expreſſe ſaying of our author, and (as hath beene ſaid) there needeth no privitie.

And it was holden by *Dyer* chiefe juſtice of the court of common pleas, and *Mounſon* juſtice, in the argument of *Bracebridge*'s caſe aboveſaid, and not denied, that if he that hath a rent charge granteth it over for life, and the tenant of the land attorne thereunto, and after he granteth the reverſion of the rent charge, that the grantee for life may attorne alone; and that theſe words of *Littleton* are to be underſtood when a rent charge or rent ſecke is granted in poſſeſſion: and therewith agreeth 46 *E.* 3. where it appeareth, that the *quid juris clamat*, in that caſe, did lie againſt the grantee for life. (1 Leon. 265. a.)

A man maketh a leaſe for life, and after grants to *A.* a rent charge out of the reverſion, *A.* granteth the rent over, he in the reverſion muſt attorne, and not the tenant of the freehold, for that the freehold is not charged with the rent; for a releaſe made to him by the grantee doth not extinguiſh the rent. And *Littleton* is to be underſtood, that the tenant of the freehold muſt attorne when the freehold is charged. 46 E. 3. 27. 2 H. 6. 9. Vi. Lit. Sect. 549 & 553.

[312. a.] "*Et en rent charge nul avowrie doit eſtre fait ſur eſcun perſon, &c.*" This is the reaſon that *Littleton* giveth of the difference betweene the rent ſervice and the rent charge. Now it may bee ſaid, that this reaſon is taken away by the ſtatute of 21 *H.* 8. for by that ſtatute the lord needs not avow for any rent or ſervice upon any perſon in certaine; and then by *Littleton*'s reaſon there needeth no privitie to the attornement of a ſeigniorie; for (ſay they) *ceſſante cauſâ vel ratione legis, ceſſat lex*, as at the common law no aid was grantable of a ſtranger to an avowrie; becauſe the avowrie was made of a certaine perſon: but now the avowrie being made by the ſaid act of 21 *H.* 8. upon no perſon, therefore the reaſon of the law being changed, the law itſelfe is alſo changed; and conſequently in an avowrie according to that act, aid ſhall be granted of any man, and the like in many other caſes; which caſe is granted to be good law: but albeit the lord (as hath beene ſaid) may take benefit of the ſtatute, yet may he avow ſtill at his election upon the perſon of his tenant. And albeit the manner of the avowrie be altered, yet the privitie (which is the true cauſe of the ſaid difference) dureth ſtill as to an attornement. 21 H. 8. cap. 19. Vide Sect. 454. 27 H. 8. 4. b. (Doc. Plac. 25, 26.)

"*Rent charge, &c.*" It is to be obſerved, to what kinde of inheritances being granted, an attornement is requiſite. And in this

chapter *Littleton* ſpeaketh of five. Firſt, of a ſeigniorie, rent ſervice, &c. Secondly, of a rent charge. Thirdly, of a rent ſecke. And hereafter in this chapter of two more, viz. of a reverſion and remainder of lands; for the tenant ſhall never need to attorne but where there is tenure, attendance, remainder, or payment of a rent out of land. And therefore if an annuitie, common of paſture, common of eſtovers, or the like, be granted for life or yeeres, &c. the reverſion may be granted without any attornement; and albeit ſometimes in ſome of theſe caſes, or the like, an attornement be pleaded, yet it is ſurpluſage, and more than needeth, becauſe in none of them there is any tenure, attendance, remainder, or payment out of land.

21 H. 7. 1. (1 Roll. Abr. 292, 293.) 1 H. 5. 1. 37 Aſſ. 14. 36 Aſſ. pl. 3. 31 H. 8. tit. Attornement Br. 59. (Ant. 303. b.)

Sect. 557.

*ITEM, ſi ſoit ſeignior et tenant, et le tenant leſſa ſon tenement a un auter pur terme de vie, le remainder a un auter en fee, et puis le ſeignior granta les ſervices a un auter, &c. et le tenant a terme de vie attorna, ceo eſt aſſets bone, pur ceo que le tenant a termie de vie eſt tenaunt en ceſt caſe al ſeignior, &c. et celuy en le remainder ne poit eſtre dit tenant al ſeignior, quant a cel entent, forſque apres la mort le tenant a terme de vie: uncore en ceſt caſe ſi celuy en le remainder moruſt ſans heire, le ſeignior avera le remainder per voy d'eſcheate, pur ceo que coment que le ſeignior en tiel cas * covient d'avower ſur le tenant a terme de vie, &c. uncore tout l'entier tenement, quant a touts les eſtates de franktenement ou de fee ſimple, ou auterment, &c. en tiel cas ſont enſemble tenus de le ſeignior, &c.*

† *Mes nemy de faire avowrie ſur eux touts enſemble.* M. 3 H. 6.

ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the lord grant the ſervices to another, &c. and the tenant for life attorne, this is good enough, for that the tenant for life is tenant in this caſe to the lord, &c. and he in the remainder cannot be ſaid to be tenant to the lord, as to this intent, untill after the death of the tenant for life: yet in this caſe if hee in the remainder dieth without heire, the lord ſhall have the remainder by way of eſcheat, becauſe that albeit the lord in ſuch caſe ought to avow upon the tenant for life, &c. yet the whole entire tenement, as to all the eſtates of the freehold or of fee ſimple, or otherwiſe, &c. in ſuch caſe are together holden of the lord, &c.

But not to make avowrie upon them all together. [312. b.] *M.* 3 *H.* 6.

15 E. 3. Attorn. 10. 12 E. 4. 4. 18 H. 6. 2. 9 E. 2. tit. Attorn. 18. 18 E. 4. 7. Temps E. 1. Attorn. 22. Vide Sect. 580. (3 Rep. 66. Ant. 310. a. Poſt. 320. b.)

"*ET le tenant a terme de vie attorna, &c.*" For he that is (as hath beene ſaid) privie and immediately tenant to the lord muſt attorne; and that is in this caſe: the tenant for life, and ſo of the other ſide if a ſeigniorie be granted to one for life, the remainder to another in fee, the attornement to the tenant for life is an attornement to the remainder alſo; unleſſe it be that they in the remainder ought to have acquitall, or other privilege (whereof they ſhould be prejudiced); and then albeit an attornement be had

* *covient d'avower—d'averera*, L. and M. and Roh.

† This paragraph not in L. and M. nor Roh.

had to the tenant for life, and he acknowledge the acquitall, &c. yet after his deceaſe, he in the remainder ſhall not diſtreyne untill he acknowledge the acquitall, notwithſtanding the attornement of the tenant for life.

"*Avera le remainder per voy d'eſcheat.*" For the remainder is holden of the lord, but not immediately holden; and in this caſe, by the eſcheat of the remainder the ſeigniorie is extinct; for the fee ſimple of the ſeigniorie being extinct, there cannot remaine a particular eſtate for life thereof, in reſpect of the tenure and attendance over; and of this opinion is *Littleton* [a] himſelfe in our bookes. But otherwiſe it is of a rent charge in fee; for if that be granted for life, and after he in the reverſion purchaſe the land, ſo as the reverſion of the rent charge is extinct, yet the grantee for life ſhall enjoy the rent during his life, for there is no tenure or attendance in this caſe. (9 Rep. 134. b. Ant. 280. a.) 3 H. 6. 1. Old Tenures 107. [a] 15 E. 4. 13. a. (1 Leon. 225.)

"*Mes nemy de faire avowrie.*" This is added to *Littleton*, but it is conſonant to law, and the authoritie truly cited. M. 3. H. 6. 1.

Sect. 558.

ITEM, ſi ſoit ſeignior et tenant, et le tenant leſſa les tenements a un feme pur terme de vie, le remainder ouſter en fee, et la feme prent baron, et puis le ſeignior granta les ſervices, &c. a le baron et ſes heires; en ceſt caſe le ſervice eſt mis en ſuſpence durant le coverture. Mes ſi la feme devie vivant le baron, le baron et ſes heires averont le rent de ceux en le remainder, &c. Et en ceo caſe il ne beſoigne aſcun attornement per parol, &c. pur ceo que le baron que doit attorne, accepta le fait del graunt de les ſervices, &c. le quel acceptance eſt un attornement en la ley.

ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh huſband, and after the lord grant the ſervices, &c. to the huſband and his heires; in this caſe the ſervice is put in ſuſpence during the coverture. But if the wife die living the huſband, the huſband and his heires ſhall have the rent of them in the remainder, &c. And in this caſe there needeth no attornement by parol, &c. for that the huſband which ought to attorne, accepted the deed of grant of the ſervices, &c. the which acceptance is an attornment in the law.

"*LE quel acceptance eſt un attornement en la ley, &c.*" *Littleton* having ſpoken (as hath beene ſaid) of attornements in deed, ſo expreſſe, now cometh to ſpeake of attornements in law, or implied; and having before ſet downe five expreſſe attornements in deed, doth in this chapter enumerate ſeven attornments in law. Here it is to be underſtood, that the expreſſe attornement of the huſband will binde the wife after the coverture, and in as much as this acceptance of the grant is an attornement in law, without a word of attornement the ſeigniorie ſhall paſſe. And this is the firſt example that *Littleton* putteth of an attornement in law, 3 E. 3. 42. 15 E. 3. Attornement, 11. (6 Rep. 63. 9 Rep. 85. 2 Roll. Abr. 424.) 44 E. 3. tit. Fines 37. 11 E. 4. 4. (1 Roll. Abr. 303.)

[313. a.]

(Ant. 280. a. 301. 310.)

law, which amounteth to an expreſſe attornement, for that it is an agreement to the grant.

If the lord grant his ſeigniorie to the tenant of the land, and to a ſtranger, and the tenant accept the deed, this acceptance is a good attornement to extinguiſh the one moitie, and to veſt the other moitie in the grantee, as hath beene ſaid.

Sect. 559.

*EN meſme le manner eſt, ſi ſoyent ſeignior et tenant, et le tenant prent feme, et puis le ſeignior granta les ſervices a la feme et ſes heires, et le baron accepta le fait; en ceſt cas apres la mort le baron, la feme et ſes heires averont les ſervices, &c. car per le acceptance * del fait per le baron, ceo eſt bone attornement, &c. coment que durant le coverture les ſervices ſont mis en ſuſpence, &c.*

IN the ſame manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant his ſervices to the wife and his heires, and the huſband accepteth the deed; in this caſe after the death of the huſband the wife and her heires ſhall have the ſervices, &c. for by the acceptance of the deed by the huſband, this is a good attornement, &c. albeit during the coverture the ſervices ſhall be put in ſuſpence, &c.

(1 Roll. Abr. 938, 939, 940.)

HERE is the ſecond example that *Littleton* putteth of an attornement in law, and ſtandeth upon the former reaſon.

(Ant. 148. b.) (4 Rep. 52.) (Cro. Car. 101.)

"*Sont miſe en ſuſpence.*" Suſpence commeth of *ſuſpendeo*, and in legall underſtanding is taken when a ſeignioris, rent, profit apprender, &c. by reaſon of unitie of poſſeſſion of the ſeigniorie, rent, &c. and of the land out of which they iſſue, are not *in eſſe* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are ſaid to be extinguiſhed when they are gone for ever, *et tunc moriuntur*; and can never be revived; that is, when one man hath as high and perdurable an eſtate in the one as in the other.

Sect. 560.

ITEM, ſi ſoyent ſeignior et tenant, et le tenant granta les tenements a un home pur terme de ſa vie, le remainder a un auter en fee, ſi le ſeignior granta les ſervices a le tenant a terme de vie † en fee, en ceſt cas le tenant a terme de vie ad fee en les ſervices; mes les ſervices ſont mis en ſuſpence durant ſa vie. Mes les heires ‡ le tenant a terme de vie averont les ſervices

ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the lord grant the ſervices to the tenant for life in fee, in this caſe the tenant for terme of life hath a fee in the ſervices; but the ſervices are put in ſuſpence during his life. But the heires of the tenant for life ſhall have the

* *del fait per* not in L. and M. nor Roh.
† *en fee* not in L. and M. nor Roh.
‡ *le tenant a terme de vie*, not in L. and M. nor Roh.

ſervices apres † ſon deceaſe, &c. ‡ Et en ceſt cas il ne beſoigne § attornement; car per l'acceptance del fait de celuy que doit attourner, &c. eſt ceo attournement de luy meſme ‖.

the ſervices after his deceaſe, &c. And in this caſe there needeth no attornement; for by the acceptance of the deed by him which ought to attorne, &c. this is an attornement of it ſelfe.

HERE is the third caſe that *Littleton* putteth of an attornement in law. And it is to bee obſerved, that albeit a grant, as hath beene ſaid, may enure by way of releaſe, and a releaſe to the tenant for life doth worke an abſolute extinguiſhment, whereof hee in the remainder ſhall take benefit, yet the law ſhall never make any conſtruction againſt the purport of the grant to the prejudice of any, [313. b.] or againſt the meaning of the parties as here it ſhould; for if by conſtruction it ſhould enure to a releaſe, the heires of the tenant for life ſhould be diſherited of the rent; and therefore *Littleton* here ſaith, that the heires of the grantee ſhall have the ſeigniorie after his death. And here is an attornement in law to a grant ſuſpended that cannot take effect in the grantee ſo long as he liveth, but ſhall take effect in his heires by deſcent; for the inheritance of the ſeigniorie was in the tenant for life, and the ſuſpenſion onely during his life. (Siderf. 25.)

Sect. 561. (Ant. 279.)

MES lou le tenant ad cy grand et haut eſtate en les tenements ſicome le ſeignior ad en le ſeigniory; en tiel caſe, ſi le ſeignior graunta les ſervices al tenant en fee, ceo urera per voy d'extinguiſhment. Cauſa patet.

BUT where the tenant hath as great and as high eſtate in the tenements as the lord hath in the ſeigniory; in ſuch caſe, if the lord grant the ſervices to the tenant in fee, this ſhall enure by way of extinguiſhment. *Cauſa patet.*

HERE *Littleton* intendeth not onely as great and high an eſtate, but as perdurable alſo, as hath beene ſaid; for a diſſeiſor or tenant in fee upon condition hath as high and great an eſtate, but not ſo perdurable an eſtate, as ſhall make an extinguiſhment.

Sect. 562.

ITEM, ſi ſoyent ſeignior et tenant, et le tenant fait un leas a un home pur terme de ſa vie, ſavant le reverſion a luy, ſi le ſeignior granta le ſeigniorie

ALSO, if there bee lord and tenant, and the tenant maketh a leaſe to a man for terme of his life, ſaving the reverſion to himſelfe, if the

† *ſon* not in L. and M. nor Roh.
‡ *&c.* not in L. and M. nor Roh.
§ *aſcun* added L. and M. and Roh.
‖ *&c.* added L. and M. and Roh.

ſeigniorie a le tenant a terme de vie ou fee; en ceſt caſe il covient que celuy en le reverſion attorna al tenant a terme de vie per force de cel grant, ou autrement le grant eſt voide, pur ceo que celuy en le reverſion eſt tenant al ſeignior, &c.

* *Et uncore il ne tiendra del tenant a terme de vie durant ſa vie.* Cauſa patet.

the lord grant the ſeigniory to tenant for life in fee; in this caſe it behoveth that he in the reverſion muſt attorne to the tenant for life by force of this grant, or otherwiſe the grant is voide, for that he in the reverſion is tenant to the lord, &c.

* Yet hee ſhall not hold of the tenant for life during his life. *Cauſa patet, &c.*

HERE in this caſe he in the reverſion of the tenancy muſt attorne, becauſe he is the tenant to the lord; and yet the ſeigniorie ſhall be ſuſpended during the life of the grantee, becauſe hee hath an eſtate for life in the tenancie, but his heires ſhall enjoy the ſeigniorie by diſcent.

"*Uncore il ni tient, &c.*" This is added, and not in the originall, and is againſt law, and therefore to be rejected. [314. a.]

"*Tenant al ſeignior, &c.*" Here is to bee underſtood a diverſity when the whole eſtate in the ſeigniory is ſuſpended, and when but part of the eſtate in the ſeigniory is ſuſpended. And in this caſe the ſeigniorie is ſuſpended but for terme of life; [a] and therefore as to all things concerning the right it hath his being; but as to the poſſeſſion during the particular eſtate the grantee ſhall take no benefit of it; therefore during that time he ſhall have no rent, ſervice, wardſhip, releaſe, harriot, or the like, becauſe theſe belong to the poſſeſſion: but if the tenant dieth without heire, the tenancie ſhall eſcheat unto the grantee, for that is in the right; and yet when the ſeigniorie is revived by the death of the tenant, there ſhall be wardſhip: as if the tenant marry with the ſeignioreſſe and dieth, his heire within age, the wife ſhall have the wardſhip of the heire. Alſo in the caſe that *Littleton* here putteth, albeit the ſeigniorie be ſuſpended but for life, yet ſome hold that he cannot grant it over, becauſe the grantee tooke it ſuſpended, and it was never *in eſſe* in him. But if the tenant make a leaſe for yeares or for life to the lord, there the lord may grant it over, becauſe the ſeigniorie was *in eſſe* in him, and the fee ſimple of the ſeigniorie is not ſuſpended. But if the lord diſſeiſe the tenant, or the tenant enfeoffe the lord upon condition, there the whole eſtate in the ſeigniorie is ſuſpended, and therefore he cannot during the ſuſpenſion take benefit of any eſcheat, or grant over his ſeigniorie.

[a] 34 Aſſ. p. 15.

16 E. 3. tit. Voucher 88.

5 E. 3. Twong's caſe. (Ant. 298. b.)

Sect. 563.

ITEM, ſi ſoient ſeignior et tenant, et le tenant tient del ſeignior per xx. maners des ſervices, et le ſeignior granta ſon ſeigniory a un auter; ſi le tenant

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by xx. manner of ſervices, and the lord grant his ſeigniory to another;

* This paragraph not in L. and M. nor Roh.

tenant paya en fait aſcun parcel d'aſcun de les ſervices al grauntee, ceo eſt bone attornment, de et pur touts les ſervices, coment que l'entent de le tenant fuit d'attourner forſque de cel parcel, pur ceo que le ſeigniory eſt † entier, coment que ils ſont divers maners des ſervices que le tenant doit faire, &c.

another; if the tenant pay in deed any parcell of any of the ſervices to the grantee, this is a good attornement, of and for all the ſervices, albeit the intent of the tenant was to attorne but for this parcell, for that the ſeigniorie is intire, although there bee divers manner of ſervices which the tenant ought to doe, &c.

HERE it appeareth that an attornement being made for parcell, is good for the whole; for ſeeing hee hath attorned for part, it cannot bee void for that, and good it cannot be unleſſe it be for the whole: but of this ſufficient hath beene ſaid before in this chapter.

4 E. 3. 55. Malman's caſe. 29 E. 3. 23. 5 E. 4. 2. 22 Aſſ. 66. 7 H. 4. 10. (Ant. 309. b.)

35 H. 6. 8. per Priſott.

"*Paya aſcun parcell des ſervices.*" Here is the fourth example of an attornement in law; for payment of any parcell of the ſervices is an agreement in law to the grant.

40 E. 3. 34. (4 Rep. 8.)

"*Coment que l'entent del tenant fuit d'attorner, &c.*" *Quia intentio inſervire debet legibus, non leges intentioni.* And yet [314. b.] as farre as it may ſtand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and ſo they ought to doe. And of this ſomewhat in this chapter hath beene ſaid before.

(Siderf. 283. 4 Rep. 85. a.) 20 H. 6. (1 Rep. 101. b. 104. a. Doctor & Student 52. a. 1 Roll. Abr. 419

Cro. Car. 1. 401. Dyer 4. a. Poſt. 367. a. Ant. 20. 47. b. 48. b. 2 Rep. 23. 4 Rep. 81. a. Ant. 42. 213. a. 217. b. 222. b. 229. a. 1 Roll. Abr. 303.)

Sect. 564.

ITEM, ſi ſoit ſeignior et tenant, et le tenant tient del ſeignior per pluſors maners des ſervices, et le ſeignior granta les ſervices a un auter per fine; ſi le grantee ſua un ſcire facias *hors del meſme le fine pur aſcun parcel de les ſervices, et ad judgement de recover, cel judgement eſt bone attornement en ley pur touts les ſervices.**

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by many kinde of ſervices, and the lord grant the ſervices to another by fine; if the grantee ſue a *ſcire facias* out of the ſame fine for any parcell of the ſervices, and hath judgment to recover, this judgment is a good attornement in law for all the ſervices.

HERE is to be obſerved, that this judgment in the *ſcire facias* (which is no more but that the demandant ſhall have execution, &c.) is a good attornement, albeit it is preſumed that *judicium redditur in invitum*, and that an attornement in law of any part

48 E. 3. 24. 3 E. 3. quod juris clamat. 4 E. 3. 28, 29. 37 H. 6. 14. per Moyle. 17 E. 3. 29.

† *forſque un et* added L. and M. and Roh. * *&c.* added in L. and M. and Roh.

part is good for the whole. And this is the fifth example that *Littleton* putteth of an attornment in law.

(Ant. 248. b. 6 Rep. 64. b.)

Note, that in case of a deede nothing passeth before attornement, as hath beene said. In the case of the fine, the thing granted passeth as to the state, but not to distraine, &c. without attornement. In the case of the king the thing granted doth passe both in estate and in privitie to distraine, &c. without attornement, unlesse it be of lands or tenements that are parcell of the duchy of *Lancaster*, and lie out of the county palatine (1).

(5 Rep. 123. Sect. 551. Cro. Car. 284. 2 Rep. 67. b. Sect. 579. 1 Roll. Abr. 294. Ant. 309. a.) (1 Sid. 139. 1 Lev. 28.)

(Ant. 159. b. 160. a.)

Sect. 565.

ITEM, si le seignior d'un rent service graunta les services a un auter, et le tenant attorna per un denier, et puis le grantee distraine pur le rent arere, et le tenant a luy fait rescous; en ceo cas le grauntee n'avera assise del rent, forsque briefe de rescous, pur ceo que le done del denier per le tenant † ne fuit forsque per voy d'attornement, &c. Mes si le tenant avoit done a le grauntee le dit denier come parcel de le rent, ou un maile ou un farthing per voy de seisin del rent, donque ceo est bone attornement, et auxy est bon seisin al grauntee del rent; et donques sur tiel rescous le grantee avera assise, &c.

ALSO, if the lord of a rent service grant the services to another, and the tenant attorne by a penny, and after the grantee distraine for the rent behinde, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescous, because the giving of the penny by the tenant was not but by way of attornement, &c. But if the tenant had given to the grantee the said penny as parcell of the rent, or a halfe penny or a farthing by way of seisin of the rent, then [315. a.] this is a good attornement, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c.

39 H. 6. 3. 26. 5 E. 4. 2. Vide Sect. 235. 25 E. 3. 44. 49 E. 3. 15. 37 H. 6. 39. 49 Ass. p. 6. 34 H. 6. 42. 15 E. 3. Execution 63. 40 E. 3. 22. 28 H. 6. 6. b. 7 H. 4. 2. tit. Attorney Br. 97. (6 Rep. 59.) (Ant. 281. a.)

HEREUPON is to be observed a diversitie betweene money given by way of attornement, and were it is given as parcell of the rent by way of seisin of the rent. For albeit the rent be not due before the day, yet a payment of parcell of the rent beforehand is an actuall seisin of the rent to have an assise. And so it is if he give an oxe, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent before-hand, this is good. And therefore a payment in name of seisin is more beneficiall for the grantee, because that is both an actuall seisin and an attornement in law; and yet being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actuall seisin, or a seisin in deed of a rent, whereof (as *Littleton* here speaketh)

(1) See Pl. Com. 221. 4 Inst. 209.

† *ne* not in L. and M. nor Roh.

ſpeaketh) an aſſiſe doth lie; and a feiſin in law which the grantee hath by attornement before actuall poſſeſſion (1).

Sect. 566.

*ITEM, ſi ſont pluſors jointenants * que teignont per certaine ſervices, et le ſeignior graunta a un auter les ſervices, et un de les jointenants attorna al grauntee, ceo eſt auxy bon, ſicome touts † uſſent attorne, pur ceo que le ſeigniory eſt entier, &c.*

ALSO, if there bee many jointenants which hold by certaine ſervices, and the lord grant to another the ſervices, and one of the joyntenants attorne to the grantee, this is as good as if all had attorned, for that the ſeigniory is entire, &c.

HERE is to be obſerved what manner of tenants ſhall attorne to the grant. And firſt, [b] if there be two or more jointenants, and one of them attorne, it is ſufficient: for, as it hath beene often ſaid, there cannot be an attornement in part. And albeit there is great authoritie againſt *Littleton*, yet the law hath beene adjudged according to *Littleton's* opinion, as it hath beene in other of his caſes when they have come in queſtion: and as it is of an attornement, ſo it is of a feiſin; a feiſin of a rent by the hands of one joyntenant is good for all, and a feiſin of part of the rent is a good feiſin of the whole.

[c] If either the grantor or the grantee die, the attornement is countermanded; but if the tenant die, he that hath his eſtate may attorne at any time. If the tenant grant over his eſtate, his aſſignee may attorne.

[d] If an infant hath lands by purchaſe or by diſcent, he ſhall be compelled to attorne in a *per quæ ſervitia*, and no miſchiefe to the infant; for when he commeth to full age, he may diſclaime to hold of him, or he may ſay that he holds by leſſer ſervices: but there ſhould be a greater miſchiefe for the lord if the attornement of an infant ſhould not be good, for he ſhould loſe his ſervices in the meane time.

If an infant be a leſſee, he ſhall be compelled to attorne in a *quid juris clamat*. The attornement of an infant to a grant by deed is good, and ſhall binde him, becauſe it is a lawfull act, albeit he be not upon that grant by deed compellable to attorne. Of baron and fem *Littleton* putteth many caſes in this chapter.

[e] A man that is deafe and dumbe, and yet hath underſtanding, may attorne by ſignes: [f] but one that is not *compos mentis* cannot attorne, for he that hath no underſtanding cannot agree to the grant.

What conveyances ſhall be good without attornements more ſhall be ſaid in this chapter in his proper place.

(1 Roll. Abr. 302.) (2 Rep. 67.)
[b] 39 H. 6. 3, 26. See Tooker's caſe ubi ſupra, and the authorities there cited. (2 Roll. Abr. 424. Ant. 297. b.)
[c] Vid. Lib. 4. fol. 8. Lib. 6. fol. 57. Lib. 9. fol. 34. Vid. 4 H. 6. 29. 18 E. 4. 10.
[d] 42 E. 3. Age 33. 26 E. 3. 62. 37 H. 8. tit. Attorne. Br. 26 E. 3. 62. 26 Aſſ. 27. 38 E. 3. tit. per quæ ſervic. 9. 2 E. 2. Attorn. 78. 2 E. 2. ibid. 77. 18 H. 6. 2. Lib. 9. f. 84, 85. Conye's caſe. 4 Mar. Dier 137. 21 E. 3. Age 85. 7 E. 2. Age 140.
[e] 26 E. 3. 63.
[f] 18 E. 3. 53.

* *que—et*, L. and M. and Roh. † *uſſent attorne—attornerent*, L. and M. and Roh.

(1) [See Note 274.]

Sect. 567. [315. b.]

*ITEM, ſi home leſſa tenements a terme d'ans, per force de quel leaſe * le leſſee eſt ſeiſie, et puis le leſſor per ſon fait granta le reverſion a auter pur terme de vie, ou en taile, ou en fee; il covient en tiel caſe que le tenant a terme d'ans attorna, ou auterment rien paſſera a tiel grauntee per tiel fait. Et ſi en ceſt caſe le tenant a terme d'ans attorna al grantee, donque maintenant paſſera le franktenement al grauntee per tiel atturnement ſauns aſcun liverie de ſeiſin, &c. pur ceo que ſi aſcun liverie de ſeiſin, † &c. ſerra ou beſoigne d'eſte fait en cel caſe, donque le tenant a terme d'ans ſerroit al temps de liverie de ſeiſin ouſte de ſon poſſeſſion, ‡ le quel ſerroit encounter reaſon, &c.*

ALSO, if a man letteth tenements for terme of yeares, by force of which leaſe the leſſee is ſeiſed, and after the leſſor by his deed grant the reverſion to another for terme of life, or in taile, or in fee; it behoveth in ſuch caſe that the tenant for yeares attorne, or otherwiſe nothing ſhall paſſe to ſuch grantee by ſuch deed. And if in this caſe the tenaunt for yeares attorne to the grantee, then the freehold ſhall preſently paſſe to the grantee by ſuch attornement without any liverie of ſeiſin, &c. becauſe if any liverie of ſeiſin, &c. ſhould be or were needfull to bee made, then the tenant for yeares ſhould be at the time of the livery of ſeiſin ouſted of his poſſeſſion, which ſhould bee againſt reaſon, &c.

HERE *Littleton* having ſpoken of grants of ſeigniories and rent charges, and rents ſecke iſſuing out of land, here treateth of a grant of a reverſion of land upon an eſtate for yeares; ſeeing this grant of the reverſion muſt be by deed, and the agreement of the leſſee for yeares requiſite thereunto, the freehold and inheritance doe paſſe thereby, as well as by liverie of ſeiſin, if it were in poſſeſſion: and the grant of the reverſion by deed with the attornement of the leſſee, doe countervaile in law a feoffment by liverie, as to the paſſing of the freehold and inheritance.

[g] 6 E. 3. 53. 25 E. 3. 55. Brook. tit. Attorn. 48. 32 E. 3. Scir. fac. 101. Dy. 1, 2. (Ante 113. a. 181. b.)

"*A terme d'ans.*" [g] And yet a tenant by ſtatute merchant, or tenant by ſtatute ſtaple, or by *elegit*, muſt alſo attorne; for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and diſcharge the land; and if the reverſion be granted by fine, they ſhall be compelled to attorne in a *quid juris clamat*.

And ſo the executors that have the land untill the debts bee paid muſt attorne upon the grant of the reverſion, although they have not any certaine terme for yeares.

* *le leſſee* not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *le quel—que*, L. and M. and Roh.

Sect. 568.

*ITEM, ſi tenements ſoient leſſes a un home pur terme de vie, ou done en le taile, ſavant le reverſion, &c. ſi celuy en le reverſion en tiel caſe granta le reverſion a un auter per ſon fait, il covient que le tenaunt de la terre attourna al grantee en la vie le grantor, ou auterment le graunt eſt voyd.**

ALSO, if tenements be letten to a man for terme of life, or given in taile, ſaving the reverſion, &c. if hee in the reverſion in ſuch caſe grant the reverſion to another by his deed, it behooveth that the tenant of the land attorne to the grantee in the life of the grantor, or otherwiſe the grant is voyd.

HERE *Littleton* ſpeaketh of a reverſion expectant upon an eſtate for life, or a gift in taile.

[316. a.] "*Il covient que le tenant de la terre attorne al grauntee, &c.*" Let us therefore ſpeake firſt of tenant for life: and yet in ſome caſe albeit tenant for life hath granted over his eſtate, yet he ſhall atturne. [*a*] As if tenant in dower or by the curteſie grant over his or her eſtate, and the heire grant over the reverſion, the tenant in dower or by the curteſie may atturne, becauſe at the time of the grant made they were attendant to the heire in reverſion, and the grantee cannot be tenant in dower, or tenant by the curteſie. And if the reverſion be granted by fine, the fine muſt ſuppoſe that the tenant in dower or by the curteſie did hold the land, albeit they had formerly granted over their eſtate, and albeit the reverſion doth paſſe by the fine; yet the *quid juris clamat* muſt be brought againſt him that was tenant at the time of the note levied. But yet after the reverſion is granted over, the grantee ſhall not have any action of waſte againſt the tenant in dower or by the curteſie, but the action of waſt muſt be brought againſt their aſſignee, and not againſt themſelves; for tenant by the curteſie or tenant in dower cannot hold of any but of the heire: and therefore in reſpect of the privitie, they ſhall attorne and be ſubject to an action of waſt, as long as the reverſion remaineth in the heire, albeit they have granted over their whole eſtate. And it is worthy of the obſervation, that if the grantee of the reverſion doth bring an action of waſt againſt the aſſignee of the tenant by the curteſie, [*b*] the pl. muſt rehearſe the ſtat. which proveth that no prohibition of waſte in that caſe lay at the common law, as it did if the heire had brought it againſt the tenant by the curteſie itſelfe: and therefore ſome doe hold, that if the heire doe grant over the reverſion, that the attornement of the aſſignee of the tenant by the curteſie, or of tenant in dower is ſufficient, becauſe they afterward muſt be attendant and ſubject to the action of waſte.

[*a*] 10 H. 4. tit. Attorn. 16. 11 H. 4. 18. 30 E. 3. 16. 38 E. 3. 23. 18 E. 3. 3. 10 E. 3. quid juris clam. 41. 41 E. 3. 18. Temps E. 1. tit. Waſt. 122. (Ant. 54. a.) F. N. B. 55. E. Regiſt. f. 72. 4 E. 3. 26. (3 Rep. 23. b.)

[*b*] Regiſt. 72.

If the reverſion of leſſee for life be granted, and leſſee for life aſſigne over his eſtate, the leſſee cannot attorne; but the attornement of the aſſignee is good, becauſe (as *Littleton* here ſaith) it behooveth that the tenant of the land doe attorne, and after the aſſignement

18 E. 4. 10. b. 26 E. 3. 62.

* &c. added L. and M. and Roh.

affignement there is no tenure or attendance, &c. betweene the leſſee and him in reverſion.

5 H. 5. 10. If leſſee for life aſſigneth over his eſtate upon condition, he having nothing in him but a condition ſhall not attorne; but the aſſignee may attorne, becauſe he is tenant of the land.

Sect. 569.

EN meſme le maner eſt, ſi terre ſoit † donz en taile, ou leſſe a un home pur terme de vie, le remainder a un auter ‡ en fee, ſi celuy en le remainder voile granter ceſt remainder a un auter, &c. ſi le tenant de la terre atturna en la vie le grantor, donques la grant de tiel remainder eſt bon, ou autrement nemy.

IN the ſame manner is it, if land be granted in taile, or let to a man for terme of life, the remainder to another in fee, if he in the remainder will graunt this remainder to another, &c. if the tenant of the land attorne in the life of the grantor, then the grant of ſuch a remainder is good, or otherwiſe not.

12 E. 4. 3, 4. 3 E. 4. 11. 43 E. 3. 1. 46 E. 3. 13. (9 Rep. 85. b.) (Ant. 27. b.) 5 H. 5. (11 Rep. 79.) 20 E. 3. quid juris clam. 50. [c] See the chap. of tenant in taile after poſſibilitie of iſſue extinct; and Ewin's caſe there cited to be adjudged.

LITTLETON alſo ſpeaketh here of an attornement by tenant in taile; and true it is that he may attorne; but where the reverſion is granted by fine, he is not compellable to attorn, becauſe he hath an eſtate of inheritance which may continue for ever. And ſo it is of a tenant in taile after poſſibilitie of iſſue extinct, he ſhall not be compelled to attorne for the inheritance which was once in him. [c] But if tenant in taile after poſſibilitie of iſſue extinct grant over his eſtate, his aſſignee ſhall be compelled to attorn, becauſe he never had but a bare eſtate for life.

But as to tenant in taile, note a diverſitie betweene a *quid juris clamat*, and a *quem redditum reddit*, or a *per quæ ſervitia*; for againſt a tenant in taile no *quid juris clamat* lieth, as is aforeſaid. But if a man make a gift in taile, the remainder in fee, and the ſeigniorie or rent charge iſſuing out of the land be granted by fine, the conuſee ſhall maintaine a *per quæ ſervitia*, or a *quem redditum*, and compell him to attorne; for herein his eſtate of inheritance is no privilege to him, for that a tenant in fee ſimple (as his eſtate was at the common law) is alſo compellable in theſe caſes to attorne, [316. b.]

(11 Rep. 79.)

Sect. 570.

* P. 12 E. 4. *Et la eſt tenus per tout le court, que tenant en taile ne ſerra arct d'atturner, mes s'il atturna* gratis, *c'eſt aſſets bone.*

P. 12 *Edw.* 4. It is there holden * by the whole court that tenant in taile ſhall not be compelled to attorne, but if he will attorne *gratis*, it is good enough.

† *donz en taile ou*, not in L. and M. nor Roh.

‡ *en fee—&c.* L. and M.

* This paragraph not in L. and M. nor Roh.

THIS

THIS is added to *Littleton*, and therefore though it be good law, and the booke truly cited, yet I paſſe it over. 12 E. 4. 3, 4.

Sect. 571.

ITEM, ſi terre ſoit leſſe a un home pur terme d'ans, le remainder a un auter pur terme de vie, reſervant al leſſour un certaine rent per an, et liverie de ſeiſin ſur ceo eſt fait al tenant pur terme d'ans; ſi ceſtuy en le reverſion en ceſt caſe granta le reverſion a un auter, † &c. et le tenant que eſt en le remainder apres le terme d'ans ‡ſoy attourna, ceo eſt bone attournement, et celuy a que ceſt reverſion eſt graunt, per force de tiel attournement diſtreynera le tenant a terme d'ans pur le rent due apres tiel attornment, coment que le tenant a terme d'ans ne unques attournaſt a luy. Et la cauſe eſt, pur ceo que lou le reverſion eſt dependant ſur l'eſtate del franktenement, ſuffiſt que le tenant del franktenement attourna ſur tiel grant del reverſion, &c.

ALSO, if land bee let to a man for years, the remainder to another for life, reſerving to the leſſor a certaine rent by the yeare, and liverie of ſeiſin upon this is made to the tenant for yeares; if hee in the reverſion in this caſe grant the reverſion to another, &c. and the tenant which is in the remainder after the terme of yeares attorne, this is a good attornement, and hee to whom this reverſion is granted by force of ſuch attornement ſhall diſtreine the tenant for yeares for the rent due after ſuch attornement, albeit that the tenant for yeares did never attorne unto him. And the cauſe is, for that where the reverſion is depending upon an eſtate of freehold, it ſufficeth that the tenant of the freehold doe attorne upon ſuch a grant of the reverſion, &c.

"*SUFFIST que le tenant del franktenement attorna.*" (1) Note, *Littleton* ſaith not here, that the tenant of the franktenement ought in this caſe to attorne, but that it ſufficeth that he doth attorne. And I heard ſir *James Dier* chiefe juſtice of the common pleas hold, that in this caſe if the tenant for yeares did attorne, it would veſt the reverſion; for ſeeing the eſtate for yeares is able to ſupport the eſtate for life, he ſhall binde him in the remainder by his attornement in reſpect of his eſtate and privitie. [317. a.]

Paſch 15 Eliz. in Braſbritche's caſe, in Communi Banco.

Sect. 572.

(Ant. 143 a. 150. b. 247. a. 308. a.) (2 Roll. Abr. 60. 424.)

ET eſt aſcavoir, que lou un leas a terme d'ans ou a terme de vie, ou done en taile, eſt fait a aſcun home, reſervant a tiel leſſor ou donor un certaine rent, &c. ſi tiel leſſor ou donor grauntà ſon reverſion a un auter, et le tenant del terre attourna, le rent paſſa al

AND it is to be underſtood, that where a leaſe for yeares or for life, or a gift in taile, is made to any man, reſerving to ſuch leſſor or donor a certaine rent, &c. if ſuch leſſor or donor grant his reverſion to another, and the tenant of the land attorne, the

† &c. not in L. and M. nor Roh. ‡ſoy not in L. and M. nor Roh.

(1) [See Note 275.]

al grauntee, coment que en le fait del grant de reverſion nul mention ſoit fait de le rent, pur ceo que le rent eſt incident al reverſion en tiel caſe, et nemy è converſo, &c. *Car ſi home voile graunter le rent en tiel caſe a un auter, reſervant a luy le reverſion del terre, coment que le tenant attorna a le grauntee, ceo ſerra forſque un rent ſecke, &c.*

the rent paſſeth to the grantee, although that in the deed of the grant of the reverſion no mention be made of the rent, for that the rent is incident to the reverſion in ſuch caſe, and not *è converſo, &c.* For if a man will grant the rent in ſuch caſe to another, reſerving to him the reverſion of the land, albeit the tenant attorne to the grantee, this ſhall bee but a rent ſecke, &c.

Of this *Littleton* hath ſpoken before in the chapter of Rents.

(Plowd. 25. b.)

Sect. 573.

ITEM, ſi home leſſa terre a un auter pur terme de ſa vie, et puis il confirma per ſon fait l'eſtate del tenant a terme de vie, le remainder a un auter en fee, et le tenant a terme de vie accepta le fait, donques eſt le remainder en fait en celuy a que le remainder eſt done ou limitte per meſme le fait. * *Car per l'acceptance del tenant a terme de vie* † *de le fait, ceo eſt un agreement de luy, et iſſint un attornement en ley. Mes uncore celuy en le remainder n'avera aſcun action de waſte ne auter benefit per tiel remainder, ſi non que il avoit le dit fait en poigne, per que le remainder fuit taile ou graunt a luy. Et pur ceo que en tiel cas le tenant a terme de vie voile per cas* ‡ *reteigner le fait a luy, a cel entent, que celuy en le remainder n'averoit aſcun action de waſte envers luy, pur ceo que il ne poit venir d'aver le fait en ſa poſſeſſion,* ‖ *il ſerra bone* § *et ſure choſe en tiel cas pur celuy en le remainder, que un fait endent ſoit fait per celuy que voile faire tiel confirmation, et le remaynder ouſter, &c. et que celuy que fait tiel confirmation delivera un part del indenture al tenant a terme de vie, et le auter part*

ALSO, if a man let land to another for his life, and after hee confirme by his deed the eſtate of the tenant for life, the remaynder to another in fee, and the tenant for life accepteth the deed, then is the remaynder in fait in him to whom the remaynder is given or limited by the ſame deed. For by the acceptance of the tenant for life of the deed, this is an agreement of him, and ſo an attornement in law. But yet hee in the remaynder ſhall not have any action of [317. b.] waſte, nor other benefit by ſuch remaynder, unleſſe that hee hath the ſaid deed in hand, whereby the remaynder was entayled or granted to him. And becauſe that in ſuch caſe the tenant for life peradventure will retaine the deed to him, to this intent, that he in the remaynder ſhould not have any action of waſte againſt him, for that hee cannot come to have the deed in his poſſeſſion, it will be a good and ſure thing in ſuch caſe for him in the remaynder, that a deed indented bee made by him which will make ſuch confirmation, and the remaynder over, &c. and that

* *Car* not in L. and M. nor Roh.
† *de le fait* not in L. and M. nor Roh.
‡ *reteigner—reſceiver*, L. and M. and Roh.
‖ *et pur ceo* added L. and M. and Roh.
§ *et ſure choſe* not in L. and M. nor Roh.

part a celuy que avera le remainder. Et donque il per monſtrance de le part del endenture poit aver action de waſt envers le tenant a terme de vie, et touts auters advantages que celuy en le remainder poit aver en tiel caſe, &c.

that hee which maketh ſuch confirmation deliver one part of the indenture to the tenant for life, and the other part to him that ſhall have the remaynder. And then he by ſhewing of that part of the indenture may have an action of waſte againſt the tenant for life, and all other advantages that he in the remainder may have in ſuch a caſe, &c.

HERE *Littleton* putteth a caſe of a remainder whereunto an attornement is requiſite. And this is the ſixth example of an attornement in law. (1 Roll. Abr. 301.) Vid. Sect. 325. 575. Vide Pl. Com. in Colthirſt's caſe, Doct. and Stud. cap. 20. fol. 93, 94.

"*Remaynder a un auter, &c.*" Of this ſufficient hath beene ſaid in the chapter of Confirmation, Sect. 525.

"*Si non que il avoit le fait en poigne.*" And albeit he hath no remedy to come to the deed during the life of tenant for life, yet becauſe he is privie in eſtate, he ſhall not maintaine an action of waſte without ſhewing the deed; but when the remainder is once executed he ſhall not need to ſhew the deed. 8 R. 2. in waſte, in livre eſcrite. 17 E. 3. Confirmat. 4. 35 H. 6. fol. 8. 14 H. 8. Pl. Com. 149, in Throckmorton's caſe.

"*Il ſerra bone et ſure choſe, &c.*" Hereby it appeareth how neceſſary it is to uſe learned advice in a man's conveyance, for thereby ſhall be prevented many queſtions, and not to follow the advice of him that is experimented only. For as in phyſicke, *Nullum medicamentum eſt idem omnibus*, ſo in law one forme or preſident of conveyance will not fit all caſes. 45 E. 3. 14, 15. 11 H. 4. 39. 14 H. 4. 31. (Ant. 10. a.)

[318. a.]

Sect. 574.

*ITEM, ſi deux joyntenants ſont, les queux leſſont lour terre a un auter pur terme de vie, rendant a eux et a lour heires certaine rent per an; en ceſt caſe ſi un des joyntenants en le reverſion releſſa a l'auter joyntenant en meſme le reverſion, ceſt releas eſt bone, et celuy a que le releas eſt fait avera ſolement le rent del tenant a terme de vie, et avera ſolement un briefe de waſte envers luy, coment que il ne unques attorneroit per force de tiel releas, * &c. Et la cauſe eſt, pur le privity que un foits fuit perenter le tenant a terme de vie et eux en le reverſion.*

ALSO, if two joyntenants be, who let their land to another for terme of life, rendring to them and to their heires a certaine yearely rent; in this caſe if one of the joyntenants in the reverſion releaſe to the other joyntenant in the ſame reverſion, this releaſe is good, and he to whom the releaſe is made ſhall have only the rent of the tenant for life, and ſhall only have a writ of waſte againſt him, although hee never attorned by force of ſuch releaſe, &c. And the reaſon is, for the privitie which once was betweene the tenant for life and them in the reverſion.

* *&c.* not in L. and M. nor Roh.

"*DEUX*

(6 Rep. 78. 2 Roll. Abr. 403. Ant. 193. a.)

"*DEUX jointenants.*" And ſo it is (as it is here to be underſtood) albeit there be three or more joyntenants, and one of them releaſeth to one of the other.

It is true, that there is a difference betweene theſe releaſes; for the releaſe in the one caſe maketh no degree, but hee to whom (Ant. 238.) the releaſe is made is ſuppoſed in from the firſt feoffor; and in the other it worketh a degree, and hee to whom the releaſe is made is in the *per* by him; yet in neither of theſe caſes there is requiſite any attornement, for both of them are within *Littleton's* reaſon (for the privitie, &c.).

2 Eliz. Dier. 176. (Ant. 185. a.)

"*Pur le privitie, &c.*" For if one joyntenant make a leaſe for yeares, reſerving a rent, and dieth, the ſurvivor ſhall not have the rent; and therefore *Littleton* here addeth materially, for the privitie that was betweene the tenant for life and them in the reverſion.

And here it is good to be ſeene what grantors or others that make conveyances, &c. are ſuch as their grants or conveyances are either good without attornement, or where the tenant is no way 45 E. 3. 6. b. compellable to attorn. Tenant for life ſhall not be compelled to 13 Eliz. Dier. attorne in a *quid juris clamat* upon a grant of a reverſion by fine 188. Lib. 3. holden of the king in chiefe without licence; but the reaſon hereof fol. 86. juſtice is not becauſe the tenant for life might be charged with the fine, Windham's caſe. for his eſtate was more ancient than the fine levied, but becauſe the court will not ſuffer a prejudice to the king, and the king may ſeiſe the reverſion and rent, and ſo the tenant ſhall be attendant to 36 H. 6. 24. another. Alſo it is a generall rule, that when the grant by fine is (1 Roll. Abr. 297.) defeaſible, there the tenant ſhall not be compelled to attorne.

As if an infant levie a fine, this is defeaſible by writ of error during his minoritie, and therefore the tenant ſhall not be compelled to attorne.

5 E. 3. 25. So if the land be holden in ancient demeſne, and he in the rever-
31 E. 3. antient demeſne 16. ſion levieth a fine of the reverſion at the common law, the tenant ſhall not be compellable to attorne, becauſe the eſtate that paſſed is reverſible in a writ of deceit.

24 E. 3. 25. b. So if tenant in taile had levied a fine, the tenant ſhould not be
37 H. 6. 33. compelled to attorne, becauſe it was defeaſible by the iſſue in
48 E. 3. 23. taile.

But now the ſtatutes of 4 *H.* 7. and 32 *H.* 8. having given a further ſtrength to fines to barre the iſſue in taile, the reaſon of the (*) Lib. 3. common law being taken away, the tenant in this caſe ſhall be com-
fol. 86. juſtice pelled to attorne, as it was adjudged (*) in juſtice *Windham's*
Windham's caſe. caſe.
17 E. 3. 7. If an alienation be in mortmaine, the tenant ſhall not be com-
22 E. 3. 16. pelled to attorne, becauſe the lord paramount may defeat it.

(1 Roll. Abr. 301.)

Sect. 575. [318. b.]

*EN meſme le maner, el pur meſme la cauſe, eſt, lou home leſſa terre a un auter pur terme de vie, le remainder a un auter pur terme de vie, reſervant le reverſion al * leſſour; en ceſt*

IN the ſame manner, and for the ſame cauſe, is it, where a man letteth land to another for life, the remainder to another for life, reſerving the reverſion to the leſſor; in this

* *leſſour—luy*, L. and M. and Roh.

ceſt cas ſi celuy en le reverſion releſſa a celuy en le remainder et a ſes heires tout ſon droit, &c. donques celuy en le remainder ad un fee, &c. et il avera un briefe de waſt envers le tenant a terme de vie ſans aſcun attornement de luy, &c.

this caſe if hee in the reverſion releaſeth to him in the remainder and to his heires all his right, &c. then he in the remainder hath a fee, &c. and hee ſhall have a writ of waſt againſt the tenant for life without any attornement of him, &c.

This needeth no explication.

Vide Sect. 519. 553. 556.

Sect. 576.

ITEM, ſi home leſſa terres ou tenements a un auter pur terme des ans, et puis il ouſta ſon termour, et ent enfeoffa un auter en fee, et puis le tenant a terme d'ans enter ſur le feoffee, en claimant ſon terme, &c. et puis fait waſt; en ceſt caſe le feoffee avera per la ley un briefe de waſt envers luy, et uncore il n'attornaſt pas † a luy. Et la cauſe eſt, come jeo ſuppoſe, pur ceo que celuy que ad droit de aver terres ou tenements pur terme d'ans, ‡ ou auterment, ne ſerroit per la ley miſconuſant de les feoffments que fueront faits de et ſur meſmes les terres, &c. Et entant que per tiel feoffment le tenant a terme d'ans fuit + mis hors de ſon poſſeſſion, et per ſon entre il cauſaſt le reverſion d'eſtre a celuy a que le feoffment fuit fait, ceo eſt bone attornement; car celuy a que le feoffment fuit fait, avoit nul reverſion devaunt que le tenant a terme d'ans avoit enter ſur luy, pur ceo que il fuit ‖ en poſſeſſion en ſon demeſne come de fee, et pur l'entrie del tenant a terme d'ans il y ad forſque un reverſion, quel eſt per le fait le tenant a terme d'ans, ſcilicet, per ſon entrie, &c.

ALSO, if a man lett lands or tenements to another for terme of yeares, and after he ouſt his termor, and thereof enfeoffe another in fee, and after the tenant for yeares enter upon the feoffee, clayming his term, &c. and after doth waſte; in this caſe the feoffee ſhall have by law a writ of waſte againſt him, and yet hee did not attorne unto him. And the cauſe is, as I ſuppoſe, for that he which hath right to have lands or tenements for yeares, or otherwiſe, ſhould not by law bee miſconuſant of the feoffments which were made of and upon the ſame lands, &c. And inaſmuch as by ſuch feoffment the tenant for yeares was put out of his poſſeſſion, and by his entrie he cauſed the reverſion to bee to him to whom the feoffment was made, this is a good attornement; for he to whom the feoffment was made, had no reverſion before the tenant for years had entred upon him, for that he was in poſſeſſion in his demeſne as of fee, and by the entrie of the tenant for yeares, hee hath but a reverſion, which is by the act of the tenant for yeares, ſcilicet, by his entrie, &c.

† *a luy* not in L. and M. nor Roh.
‡ *ou autrement* not in L. and M. nor Roh.
+ *mis hors de ſon poſſeſſion, et per ſon entrie il cauſa le reverſion d'eſtre a celuy a que le feoffment fuit*, not in L. and M. nor Roh.
‖ *en poſſeſſion—ſeiſie*, L. and M. and Roh.

Sect. 577.

MESME la ley eſt, come il ſemble, lou un leas eſt fait pur terme de vie, ſavant le reverſion al leſſour, ſi le leſſour diſſeiſiſt le leſſee, et fait feoffment en fee, ſi le tenant a terme de vie enter et fait waſt, le feoffee avera briefe de waſte ſans aſcun auter attournement, cauſâ quâ ſupra, &c.

THE ſame law is, as it ſeemeth, where a leaſe is made for life, ſaving the reverſion to the leſſor, if the leſſor diſſeiſe the leſſee, and make a feoffment in fee, if the tenant for life enter and make waſte, the feoffee ſhall have a writ of waſte without any other attornement, *cauſâ quâ ſupra, &c.* (1)

(6 Rep. 69. a.) THERE have been now in all ſeven examples, that *Littleton* putteth of an attornement in law, and here he putteth two caſes alſo of a notice in law. And the reaſon of both theſe are here rendred by *Littleton*. Firſt for the notice, *Littleton* ſaith that the leſſee ſhall not by law be miſconuſant of the feoffments that were made of and upon the ſame land. And the reaſon of the attornement is, becauſe the whole fee ſimple paſſeth by the feoffment, and the leſſee by his regreſſe leaveth the reverſion in the feoffee, which (ſaith *Littleton*) is a good attornement. The ſame law it is of a tenant by ſtatute merchant or ſtaple, or *elegit*. And ſo it is of a leaſe for life, as *Littleton* here ſaith; and ſo it was reſolved [*e*] in *Braſbritche's* caſe, and after in the deane of *Paul's* his caſe in the common place. But ſhall the leſſee in this caſe whether hee will or no doe an act that amounts to an attornement, viz. by his regreſſe, or elſe loſe the profit of his land? And ſome doe hold, that in that caſe if the leſſee for life doe recover in an aſſiſe, this is no attornement, becauſe hee comes to it by courſe of law, and not by his voluntary act. And yet in that caſe, as in the caſe of the fine, the ſtate of the reverſion is in the feoffee. [*f*] But others doe hold it all one in caſe of a recovery, and a regreſſe.

46 E. 3. 30. b.
2 H. 5. 4.
5 H. 5. 12.
34 H. 6. 6.
18 E. 3. 47.
9 H. 6. 10.
(5 Rep. 113. b.)
[e] Braſbritche's caſe. P. 15 Eliz. Deane of Paul's caſe, 20 Eliz.
(34 H. 6. 7.)

[319. a.]

[f] 18 E. 3. 48. b. Lib. 6. fol. 60. b. Sir Moyle Finche's caſe.

[g] If the leſſor diſſeiſe tenant for life, or ouſte tenant for yeares, and maketh a feoffment in fee, by this the rent reſerved upon the leaſe for life or yeares is not extinguiſhed, but by the regreſſe of the leſſee the rent is revived, becauſe it is incident to the reverſion: and ſo hath it beene adjudged. But if a man be ſeiſed of a rent in fee, and diſſeiſe the tenant of the land, and make a feoffment in fee, the tenant re-entreth, this rent is not revived. And ſo note a diverſitie between a rent incident to a reverſion, and a rent not incident to a reverſion.

[g] 9 H. 6. 16. Deane of Paul's caſe, ubi ſupra. (Poſt. 321. b.)
(6 Rep. 70. a.)

(Ant. 297. b. 2 Rep. 67. a.) If two joynt leſſees for yeares or for life be ouſted or diſſeiſed by the leſſor, and he enfeoffe another, if one of the leſſees reenter, this is a good attornement, and ſhall binde both; for an attornement in law is as ſtrong as an attornement in deed.

(6 Rep. 69. Mo. 99 Ant. 266. a.) If a man make a leaſe for life, and then grant the reverſion for life, and the leſſee attorne, and after the leſſor diſſeiſe the leſſee for life, and make a feoffment in fee, and the leſſee re-enter, this ſhall leave a reverſion in the grantee for life, and another reverſion in the feoffee, and yet this is no attornement in law of the grantee

(1) [See Note 276.]

grantee for life, becauſe he doth no act, nor aſſent to any which might amount to an attornement in law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in poſſeſſion, ſo as he may well be miſconuſant of the feoffment made upon the land, and ſo out of the reaſon of *Littleton*. But yet the reverſion in fee doth paſſe to the feoffee. (2 Rep. 671.)

[319. b.] Sect. 578.

*ITEM, ſi leas ſoit fait pur terme de vie, le remainder a un auter en le taile, le remainder ouſter a les droit heires le tenant a terme de vie; en ceſt caſe, ſi le tenant a terme de vie granta ſon remainder en fee a auter per ſon fait, cel remainder maintenant paſſa per le fait ſans aſcun attournment, * &c. car ſi aſcun doit attorne en ceſt caſe, ceo ſerroit le tenant a terme de vie, et en vain ſerroit que il atturneroit ſur ſon grant demeſne, &c.*

ALSO, if a leaſe be made for life, the remainder to another in taile, the remainder over to the right heires of the tenant for life; in this caſe, if the tenant for life grant his remainder in fee to another by his deede, this remainder maintenant paſſeth by the deede without any attornement, &c. for that if any ought to attourne in this caſe, it ſhould be the tenant for life, and in vaine it were that he ſhould attorne upon his owne grant, &c.

HERE it appeareth, that where the anceſtor taketh an eſtate of freehold, and after a remainder is limited to his right heires, that the fee ſimple veſteth in himſelf, as well as if it had beene limited to him and his heires; for his right heires are in this caſe words of limitation of eſtate, and not of purchaſe. Otherwiſe it is where the anceſtor taketh but an eſtate for yeares: as if a leaſe for yeares be made to *A.* the remainder to *B.* in tayle, the remainder to the right heires of *A.* there the remainder veſteth not in *A.* but the right heires ſhall take by purchaſe if *A.* die during the eſtate taile: for as the anceſtor and the heire are *correlativa* of inheritances, ſo are the teſtator and executor, or the inteſtate and adminiſtrator of chattels. And ſo it is if *A.* make a feoffment in fee to the uſe of *B.* for life, and after to the uſe of *C.* for life or in taile, and after to the uſe of the right heires of *B.* *B.* hath the fee ſimple in him as well when it is by way of limitation of uſe, as when it is by act executed (1). (Ant. 13. b. 1 Roll. Abr. 127.) (1 Rep. 66.) (Ant. 54. b.) (1 Roll. Abr. 627.)

"*En vaine ſerroit, &c.*" *Quod vanum et inutile eſt lex non requirit. Lex eſt ratio ſumma, quæ jubet quæ ſunt utilia et neceſſaria, et contraria prohibet;* and arguments drawne from hence are forcible in law. Vid. Sect. 194. 273.

* *&c.* not in L. and M. nor Roh.

(1) The obſervation of Mr. Douglas (note to page 506 of his Reports) deſerves the reader's moſt ſerious attention.

Sect. 579.

ITEM, ſi ſoit ſeignior et tenant, et le tenant tient del ſeignior per certaine rent, et ſervice de chivaler, ſi le ſeignior granta les ſervices de ſon tenant per fine, les ſervices ſont maintenant en le grantee per force del fine; mes uncore le ſeignior ne poet pas diſtreyne per aſcun parcel de les ſervices ſans attournment: mes ſi le tenant devia (ſon heire deins age) le ſeignior avera le gard del corps del heire, et de ſes terres, &c. coment que il ne unque atturnaſt, pur ceo que le ſeigniorie fuit en le grantee maintenant per force del fine. Et auxy en tiel cas, ſi le tenant moruſt ſans heire, le ſeignior avera les tenements per voy d'eſcheat.

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by certaine rent, and knight's ſervice, if the lord grant the ſervices of his tenant by fine, the ſervices are preſently in the grantee by force of the fine; but yet the lord may not diſtreine for any parcell of the ſervices, without attornement: but if the tenant dieth, his heire within age, the lord ſhall have the wardſhip of the bodie of the [320. a.] heire, and of his lands, &c. albeit he never attorned, becauſe that the ſeigniorie was in the grantee preſently by force of the fine. And alſo in ſuch caſe if the tenant die without heire, the lord ſhall have the tenancie by way of eſcheat.

HERE *Littleton* beginneth to ſhew what advantages the conuſee of a fine may take before attornement, and what not.

[*h*] 8 E. 3. 44. 26 E. 3. 63. 10 H. 6. 16. 34 H. 6. 7. 12 E. 4. 4. 40 E. 3. 7. 5 H. 5. 12. 48 E. 3. 15. b. 3 E. 2. droit. 33. (F. N. B. 60. Sect. 564. 4 Init. 209, 210.)

[*h*] Firſt, he cannot diſtreyne, becauſe an avowrie is in lieu of an action; and thereupon privitie is requiſite. So likewiſe, and for the ſame cauſe, he can have no action of waſte, nor writ of entrie, *ad communem legem*, or *in conſimili caſu*, or *in caſu proviſo*, writ of cuſtomes and ſervices, nor writ of ward, &c. (1)

But if a man make a leaſe for yeares, and grant the reverſion by fine, if the leſſee be ouſted, and the conuſee diſſeiſed, the conuſee, without attornement, ſhall maintaine an aſſiſe; for this writ is maintained againſt a ſtranger, where there needeth no privitie. And ſuch things as the lord may ſeiſe, or enter into without ſuing any action, there the conuſee, before any attornement, may take benefit thereof; as to ſeiſe a ward or heriot; or to enter into the lands or tenements of a ward; or eſcheated to him; or to enter for an alienation of tenant for life or yeares; or of tenant by ſtatute merchant, ſtaple, or *elegit*, to his diſheriſon.

Sect. 580, 581, 582.

EN meſme le manner eſt, ſi home granta le reverſion de ſon tenant a terme de vie a un auter per fine, le reverſion paſſa maintenant al grantee per

IN the ſame manner it is, if a man graunt the reverſion of his tenant for life to another by fine, the reverſion maintenant paſſeth to the grantee

(1) [See Note 277.]

per force del fine, mes le grantee jammes n'avera action de waſt ſans atturniment, &c.

grantee by force of the fine, but the grantee ſhall never have an action of waſt without attornment, &c.

Sect. 581.

*MES uncore ſi le tenant a terme de vie alienaſt en fee, le grantee poet enter, * &c. pur ceo que le reverſion fuit en luy per force del fine, et tiel alienation fuit a ſon diſheritance.*

BUT yet if the tenant for life alieneth in fee, the grantee may enter, &c. becauſe the reverſion was in him by force of the fine, and ſuch alienation was to his diſheritance.

Sect. 582.

MES en † ceo cas lou le ſeignior granta les ſervices de ſon tenant per fine, ſi tenant devie (ſon heire eſteant de plein age) le grantee per le fine n'avera reliefe, ne unques diſtreynera pur reliefe, ſinon que il ‡ avoit l'attornement del tenaunt que moruſt: ‡ car de tiel choſe que gijt en diſtreſſe, ſur que le breve de replevin eſt ſue, &c. home doit et covient d'avower le priſel bone et droiturel, &c. et la covient eſtre attornement del tenant, coment que le graunt de tiel choſe ſoit per fine: mes d'aver le gard de les terres ou tenements iſſint tenus durant le nonage le heire, ou de eux aver per voy d'eſcheat, la ne beſoigne aſcun diſtreſſe, &c. mes un entrie en la terre per force de le droit del ſeigniory que le grantee ad per force del fine, &c. Sic vide diverſitatem §.

BUT in this caſe where the lord granteth the ſervices of his tenant by fine, if the tenant die (his heire being of ful age) the grantee by the fine ſhall not have reliefe, nor ſhal ever diſtreine for reliefe, unleſſe that hee hath the attornement of the tenant that dieth: for of ſuch a thing which lieth in diſtreſſe, whereupon the writ of replevin is ſued, &c. a man muſt and ought to avow the taking good and rightfull, &c. and there there ought to be an attornment of the tenant, although the graunt of ſuch a thing be by fine: but to have the wardſhip of the lands or tenements ſo holden during the nonage of the heire, or to have them by way of eſcheat, there needs no diſtreſſe, &c. but an entrie into the land by force of the right of the ſeigniorie, which the grauntee hath by force of the fine, &c. *Sic vide diverſitatem, &c.*

IT is ſaid in our books that if tenaunt for life have a privilege not to be impeachable of waſte, or any other privilege, if he doth attorne without ſaving his privilege, that hee hath loſt it; which is ſo to be underſtood, where he attornes in a *quid juris clamat* brought by the conuſee of a fine, that if he claimeth not his privilege, but

40 E. 3. 7.
43 E. 3. 5.
48 E. 3. 32.
45 E. 3. 6.
21 E. 3. 48.
24 E. 3. 32.
39 H. 6. 25.

* *&c.* not in L. and M. nor Roh.
† *ceo* not in L. and M. nor Roh.
‡ *avoit l'attornement — fuſoit attornement*, L. and M and Roh.
‡ *&c.* added L. and M. and Roh.
§ *&c.* added L. and M. and Roh.

F. N. B. 136. b. (3 Rep. 86. 11 Rep. 79. 1 Rol. Abr. 412. 296. Ant. 274. b.)

but attorne generally, his privilege is loſt, for that the writ ſuppoſeth him to be but a bare tenant for life; and by his generall attornement, according to the writ, he is barred for ever to claime any privilege but a bare eſtate for life. But if upon a grant of the reverſion by deed, the tenant for life doth attorne, he loſeth no privilege; for there can be no concluſion or barre by the attornement *in pais*: and ſo it is of an attornement in law. As if the leſſor diſſeiſe the leſſee for life, and make a feoffement in fee, and the leſſee reenter; this is an attornement in law, which ſhall not prejudice him of any privilege: ſo it is if the leſſor levie a fine of the reverſion, and the conuſee die without heire, whereby the reverſion eſcheateth, in this caſe the law doth ſupply an attornment, and therefore the leſſee ſhall loſe no privilege. But in the *quid juris clamat*, if the leſſee ſhew his eſtate and his privilege, and is ready, ſaving to him his privilege, &c. to attorne, hereby either his privilege ſhall bee allowed and entred of record, or he ſhall not be compelled to attorne: [*b*] and if the plaintife be within age, ſo as hee cannot acknowledge the privilege, the tenant ſhall not be compelled to attorne untill his full age, when he may acknowledge it. But otherwiſe it is (as ſome hold) if a *quid juris clamat* be brought by baron and feme, the privilege ſhall be entred into the rolle, notwithſtanding ſhee is a feme covert. And in a *per quæ ſervicia* brought by the conuſee of the meſne; the tenant may ſhew that he held by homage aunceſtrell, and ſaving to him his warrantie and acquitall, he is readie to attorne. In the ſame manner, if the tenant hath any other acquitall, and the meſne levie a fine to one for life, the remainder to another in fee, the tenant for life bringeth a *per quæ ſervicia*, and the tenant is ready to attorne, ſaving his acquitall, and the plaintife acknowledgeth it, and thereupon the tenant attorne, tenant for life dieth; in this caſe, albeit regularly the attornement to the tenant for life is an attornement to him in the remainder, yet in this caſe hee in the remainder ſhall not diſtreine, till he hath acknowledged the acquitall, which muſt be in a *per quæ ſervicia*, brought by him againſt the tenant.

[320. b.]

(5 Rep. 39. b.) (Ant. 157. b.) [*b*] 43 E. 3. 5. (6 Rep. 4. a. 9 Rep. 85. b.) 45 E. 3. 11. a. Vet. N. B. in per quæ ſervicia. 5 E. 3. Meſne 56. & per quæ ſervicia 16. 37 H. 6. 33. 39 H. 6. 25. 18 E. 4. 7. (7 Rep. 4. b.)

Vid. Sect. 557.

"*Alien en fee, &c.*" Of this ſufficient hath beene ſaid in the next precedent Section.

"*N'avera relieſe, &c.*" Of this ſufficient hath beene ſaid in the next precedent Section.

Sect. 583.

[321. a.]

*ITEM, ſi ſoit ſeignior, meſne et tenant, et le meſne graunta per fine les ſervices de ſon tenant a un auter en fee, et puis le grantee moruſt ſans heire, ore les ſervices del meſnaltie deviendront et eſcheute al ſeignior paramont per voy d'eſcheat; * et ſi apres*

ALSO, if there be lord, meſne and tenant, and the meſne grant by fine the ſervices of his tenant to another in fee, and after the grantee die without heire, now the ſervices of the meſnaltie ſhall come and eſcheate to the lord paramont by way

* *et* not in L. and M. nor Roh.

apres les ſervices del meſnaltie ſont aderere, en ceſt cas celuy que fuit ſeignior paramont poit diſtreiner le tenant, nient obſtant que le tenant ne unques atturnaſt: et le cauſe eſt, pur ceo que le meſnaltie fuit en fait en le grantee per force de le † dit fine, et le ſeignior paramont puiſſoit avower ſur le grantee, pur ceo que il fuit ſon tenant en fait, coment que il ne ſerroit a ceo compelle, &c. Mes ſi le grantor en ceſt caſe deviaſt ſans heire en la vie le grantee, donque il ſerroit compelle d'avower ſur le grantee; et auxy entant que le ſeigniour paramont ne claime le meſnaltie per force del graunt fait per fine levie per le meſne, ‡ mes per vertue de ſon ſeigniorie paramont, ‖ ſcilicet, per voy d'eſcheat, il avowa ſur le tenant pur les ſervices que le meſne avoit, &c. coment que le tenant ne unques atturna pas.

way of eſcheat; and if afterwards the ſervices of the meſnaltie bee behind, in this caſe hee which was lord paramont may diſtreine the tenant, nowithſtanding that the tenant did never attorne: and the cauſe is, for that the meſnaltie was in deed in the grantee by force of the ſaid fine, and the lord paramont may avow upon the grantee, becauſe in deed hee was his tenant, albeit hee ſhall not be compelled to this, &c. But if the grantor in this caſe had died without heire in the life of the grantee, then he ſhould bee compelled to avow upon the grantee; and alſo in as much the lord paramont doth not claime the meſnaltie by force of the grant made by fine levied by the meſne, but by vertue of his ſeigniorie paramont, *viz.* by way of eſcheat, he ſhall avow upon the tenant for the ſervices which the meſne had, &c. albeit that the tenant did never attorne.

HERE *Littleton* putteth the caſe where one that claimeth under a conuſee by fine may diſtraine or maintaine any action, albeit there was never any attornement made to the conuſee, or to him that hath his eſtate. 45 E. 3. 2. 34 H. 6. 7. 37 H. 6. 38. 39 H. 6. 32. 5 H. 7. 18. per curiam.

And here is a diverſitie betweene an act in law that giveth one inheritance in lieu of another, and an act in law that conveyeth the eſtate of the conuſee only. Of the former *Littleton* here putteth an example of the eſcheat of the meſnaltie which drowneth the ſeigniorie paramont; and therefore reaſon would that the lord by this act in law ſhould have as much benefit of the meſnaltie eſcheated, as he had of the ſeigniorie that is drowned; and the rather for that the law caſteth it upon him, and hee hath no remedy to compell the [321. b.] tenant to attorne. Another reaſon hereof *Littleton* here yeeldeth, becauſe the lord commeth to the meſnaltie by a ſeigniorie paramont, and therefore there needeth no attornement. [c] As if leſſee for life be of a mannor, and he ſurrender his eſtate to the leſſor, there needeth no attornement of the tenant's, becauſe the leſſor is in by a title paramount. But if the conuſee dieth, and the law caſteth his ſeigniorie upon his heire by deſcent, he ſhall not be in any better eſtate than his anceſtor was, becauſe he claimeth as heire meerely by the conuſee. Lib. 6. fol. 68. Sir Moyle Finche's caſe. [c] Temps E. 2. Attorn. 18. 39 H. 6. 38. per Priſot. (Ant. 104. b. 309. b.)

So it is (as hath beene ſaid) if the conuſee of a fine before attornement bargaineth and ſelleth the ſeigniorie by deed indented and inrolled, the bargainee ſhall not diſtraine, becauſe the bargainor, from whom the ſeigniorie moveth, had never actuall poſſeſſion. (5 Rep. 113.)

So

† *dit* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.
‖ *ſcilicet* not in L. and M. nor Roh.

Sir Moyle Finche's caſe, ubi ſupra.

So and for the ſame reaſon if a reverſion be granted by fine, and the conuſee before attornement diſſeiſe the tenant for life and make a feoffment in fee, and the leſſee re-enter, the feoffee ſhall not diſtraine.

Sect. 584.

EN meſme le maner eſt, lou le reverſion d'un tenant a terme de vie ſoit grant per fine a un auter en fee, et le grantee apres moruſt ſans heire, ore le ſeignior ad le reverſion per voy d'eſcheat; et ſi apres le tenant fait waſt, le ſeignior avera briefe de waſt envers luy, nient contrifteant que il ne unques atturna, cauſâ quâ ſupra. *Mes lou un home claime per force del graunt fait per le fine,* † ſcilicet, *come heire, ou come aſſignee, &c. la il ne diſtreinera* ‡ *ne avowera, ne avera action de waſt, &c. ſans attornement.*

IN the ſame manner it is, where the reverſion of a tenant for life is granted by fine to another in fee, and the grantee afterwards dieth without heire, now the lord hath the reverſion by way of eſcheat; and if after the tenant maketh waſt, the lord ſhall have a writ of waſte againſt him, notwithſtanding that he never attorned, *cauſâ quâ ſupra.* But where a man claimeth by force of the grant made by the fine, *ſcil.* as heire, or as aſſignee, &c. there hee ſhall not diſtraine nor avowe, nor have an action of waſte, &c. without attornement.

(Ant. 104. b.)

HERE *Littleton* expreſſeth two diverſities. Firſt, betweene an act in law, and the grant of the party. This caſe is put of an [*d*] eſcheat, which is a meere act in law, but ſo it is when it is partly by act in law, and partly by the act of the party; as if the conuſee of a ſtatute merchant extendeth a ſeigniorie or rent, hee ſhall diſtraine without any attornement. If a man make a leaſe for life or yeares, and after levie a fine to *A.* to the uſe of *B.* and his heires, *B.* ſhall diſtraine and have an action of waſte, albeit the conuſee never had any attornement, becauſe the reverſion is veſted in him by force of the ſtatute, and hath no remedy to compell the leſſee to attorne.

[*d*] 45 E. 3. 2. 31 H. 6. 7. 5 H. 7. 18. per curiam. 13 H. 4. avowrie 237. (4 Rep. 64. 1 Roll. Abr. 293. Ant. 153. a.) Lib. 6. fol. 68. in Sir Moyle Finche's caſe.

(Mo. 92. 68.) 27 H. 8. cap. 10.

(Ant. 309. 2 Cro. 193. 5 Rep. 113. a. 6 Rep. 68. b. 10 Rep. 45.)

And ſo it is of a hargaine and ſale by deed indented and inrolled, but this is by force of a ſtatute ſince *Littleton* wrote.

Secondly, where he that commeth in by act in law is in the *per*, as the heire of the conuſee, who ſetteth in his anceſtor's ſeat, *tanquam pars anteceſſoris de ſanguine*, and the lord by eſcheat, which is an eſtranger, and commeth in meerely in the *poſt*.

† *&c.* added L. and M. and Roh.
‡ *ne avowera* not in L. and M. nor Roh. nor in MSS.

Sect. 585.

(F.N.B. 121. a.)

ITEM, en ancient boroughs et cities, lou terres et tenements deins meſme les boroughes et
[322. a.] *cities ſont deviſable per teſtament per cuſtome et uſe, &c. ſi en tiel § borough ou citie home ſoit ſeiſie de rent ſervice, ou de rent charge, et deviſa cel rent ou ſervice a un auter per ſon teſtament et moruſt; en ceſt cas celuy a que tiel deviſe eſt fait, poit diſtreiner le tenant pur le rent ou ſervice aderere, coment que le tenant n'attorna pas.*

ALSO, in ancient boroughs and cities, where lands and tenements within the ſame boroughes and cities are deviſable by teſtament by cuſtome and uſe, &c. if in ſuch borough or citie a man be ſeiſed of a rent ſervice, or of a rent charge, and deviſeth ſuch rent or ſervice to another by his teſtament and dieth; in this caſe, he to whom ſuch deviſe is made, may diſtreine the tenant for the rent or ſervice arere, although the tenant did never attorne.

HERE doth *Littleton* put a caſe where a man may have a ſeigniory, rent, reverſion, or remainder meerely by the act of the party, and may diſtraine, and have any action without any attornement, and that is by deviſe of lands deviſable by cuſtome when *Littleton* wrote, by the laſt will and teſtament of the owner.

34 H. 6. 6.
5 H. 7. 18.
19 H. 6. 21.
21 H. 6. 38.
F. N. B. 121. a.

Sect. 586.

(6 Rep. 23.)
(5 Rep. 68.)
(1 Rep. 120. 3 Rep. 19. 6 Rep. 16. 81.) (8 Rep. 94.) (10 Rep. 46. 87.) (4 Rep. 66.)

EN meſme le maner eſt, lou home leſſa tiels tenements deviſables a un auter pur terme de vie, ou pur terme d'ans, et deviſa le reverſion per ſon teſtament a un auter en fee, ou en fee taile, et moruſt, et puis le tenant fait waſt, celuy a que le deviſe fuit fait avera brieſe de waſt, coment que le tenant ne unque attorna. Et la cauſe eſt, pur ceo que la volunt le deviſour fait per ſon teſtament ſerra performe ſolonque l'entent del deviſour; et ſi l'effect de ceo girroit ſur l'attournement del tenant, † donques per caſe le tenant ne voyle unques atturner, et donques le volunt del deviſor ne ſerroit unque performe, ‡ &c. et pur ceo le deviſee diſtreinera, &c. ou avera action de waſt, &c. ſans attournement. Car ſi home deviſa tiels tenements a un auter per ſon teſtament, habendum

IN the ſame manner is it, where a man letteth ſuch teneements deviſable to another for life, or for yeares, and deviſeth the reverſion by his teſtament to another in fee, or in fee taile, and dyeth, and after the tenant commits waſte, he to whom the deviſe was made ſhall have a writ of waſte, although the tenant doth never attorne. And the reaſon is, for that the will of the deviſor made by his teſtament ſhall bee performed according to the intent of the deviſor; and if the effect of this ſhould lye upon the attornement of the tenant, then perchance the tenant would never attorne, and then the will of the deviſor ſhould never bee performed, &c. and for this the deviſee ſhall diſtraine, &c. or he ſhall have an action of waſte, &c. without attornement.

§ *cas* added L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

habendum ſibi imperpetuum, *et moruſt, et le deviſee enter, il ad fee ſimple*, cauſâ quâ ſupra; * *uncore † ſi fait de feoffment uſt eſte ‡ fait a luy per le deviſor en ſa vie de meſmes les tenements*, habendum ſibi imperpetuum, *et livery de ſeiſin ſur ceo fuit fait, il n'averoit eſtate forſque pur terme de ſa vie.*

attornement. For if a man deviſeth ſuch tenements to another by his teſtament, *habendum ſibi imperpetuum*, and dieth, and the deviſee enter, hee hath a fee ſimple, *cauſâ quâ ſupra*; yet if a deed of [322. b.] feoffment had beene made to him by the deviſor of the ſame tenements, *habendum ſibi imperpetuum*, and livery of ſeiſin were made upon this, hee ſhould have an eſtate but for terme of his life.

BOTH this and the precedent caſe ſtand upon one and the ſame reaſon, which *Littleton* here yeeldeth, viz. becauſe that the will of the deviſor expreſſed by his teſtament ſhall be performed according to the intent of the deviſor; and it ſhall not lie in the power of the tenant or leſſee to fruſtrate the will of the deviſor by denying his attornment. Here *Littleton* mentioneth a maxime of the common law, viz. *Quòd ultima voluntas teſtatoris eſt perimplenda ſecundum veram intentionem ſuam*: and, *Reipublicæ intereſt ſuprema hominum teſtamenta rata haberi.*

(1 Roll. Abr. 293.) Vide Sect. 167. Bracton li. 1. f. 11. & f. 60. Fleta lib. 2. cap. 15. Britton fol. 78. & f. 212. b. (6 Rep. 23. Ant. 9. b.)

"*Teſtament*," *Teſtamentum, i. e. teſtatio mentis*, which is made *nullo præſentis metu periculi, ſed ſolâ cogitatione mortalitatis. Omne teſtamentum morte conſummatum.*

22 E. 3. 16. 34 H. 6. 7. 15 H. 7. 12. 19 H. 8. 4.

"*Car ſi home deviſa tiels tenements a un auter, &c.*" Here *Littleton* putteth a caſe where the intent of the teſtator ſhall be taken, viz. where a man by deviſe ſhall have a fee ſimple without theſe words (heires); and here *Littleton* putteth the diverſitie betweene a will and a feoffment.

Vide Sect. 167.

Now by the ſtatutes of 32 and 34 *H.* 8. (as hath beene ſaid in the chapter of Burgage) lands, tenements, and hereditaments are deviſable, as by the ſaid acts doe appeare.

Sect. 587.

ITEM, ſi home ſeiſie d'un mannor quel eſt parcel en demeſne et parcel en ſervice, et ent ſoit diſſeiſie, mes les tenants que teignont del mannor ne unque attournant § a le diſſeiſor; en ceſt cas, coment que le diſſeiſor moruſt ſeiſie, et ſon heire ſoit eins per diſcent, &c. uncore poit le diſſeiſee diſtreine pur le rent arere, et aver les ſervices, &c. Mes ſi les tenants viendront al diſſeiſor, et dionț, Nous deveignomus voſtre

ALSO, if a man bee ſeiſed of a mannor which is parcell in demeſne and parcell in ſervice, and is thereof diſſeiſed, but the tenants which hold of the mannor doe never attorne to the diſſeiſor; in this caſe, albeit the diſſeiſor dieth ſeiſed, and his heire is in by diſcent, &c. yet may the diſſeiſee diſtreine for the rent behinde, and have the ſervices, &c. But if the tenants come to the diſſeiſor

* *et* added L. and M. and Roh.
† *ſi—le*, L. and M. and Roh.
‡ *uſt eſte—fuit*, L. and M.
§ *a le—de le*, L. and M. and Roh.

voſtre tenants, &c. ou auter attournement a luy ſeſoyent, &c. et puis le diſſeiſor moruſt ſeiſie, donque le diſſeiſee ne poit diſtreine pur le rent, &c. pur ceo que tout le manor diſcendiſt al heire le diſſeiſor, &c.

diſſeiſor and ſay, We become your tenants, &c. or make to him ſome other attornement, &c. and after the diſſeiſor dieth ſeiſed, then the diſſeiſee cannot diſtraine for the rent, &c. for that all the mannor deſcendeth to the heire of the diſſeiſor, &c.

LITTLETON having ſpoken of eſtates gained by lawful conveyances, doth now ſpeake of eſtates gained by wrong; and here putteth a caſe of a diſſeiſin of a manhor, where it appeareth, that the diſſeiſor cannot diſſeiſe the lord of the rents or ſervices [323. a.] without the attornement of the tenants to the diſſeiſor; for ſeeing an attornement is requiſite to a feoffment and other lawfull conveyances, *à fortiori*, a diſſeiſor or other wrong doer ſhall not gaine them without attornement. The like law is of an abator and an intrudor. But albeit the diſſeiſor hath once gotten the attornement of the tenants and payment of their rents, yet may they refuſe afterwards for avoiding of their double charge. And here the attornement of the tenant of a mannor to a diſſeiſor of the demeanes ſhall diſpoſſeſſe the lord of the rents and ſervices parcell of the mannor, becauſe both demeanes, rents and ſervices make but one entire mannor, and the demeanes are the principall: but otherwiſe it is of rents and ſervices in groſſe, as in this next Section our author teacheth us,

(6 Rep. 69. a.)

6 H. 7. 14.
11 H. 7. 28.
11 H. 4. 14. a. b.
(Cro. Car. 303.
Ant. 180.)

(1 Roll. Abr. 662.)

Sect. 588.

(Cro. Car. 303. Roll. Abr. 658.)
F. N. B. 179. k. (Ant. 180. b. 2 Siderf. 75.)

*MES ſi un tient de moy per rent ſervice, le quel eſt un ſervice en groſſe, * et nient per reaſon de mon mannor, et un auter que nul droit ad, † claima le rent, ‡ et receive et prent meſme le rent de mon tenant per coherſion de diſtres, ou per auter forme, et diſſeiſiſt moy per tiel prender de rent; coment que tiel diſſeiſor moruſt iſſint ſeiſie en pernant de rent, uncore apres ſa mort jeo puiſſoy bien diſtreiner le tenant pur le rent que fuit aderere devant le ‖ deceaſe del diſſeiſor, et auxy apres ſon deceaſe. Et la cauſe eſt, pur ceo que tiel diſſeiſor n'eſt pas mon diſſeiſor forſque a ma election et ma volunt. Car coment que il prent le rent de*

BUT if one holdeth of mee by rent ſervice, which is a ſervice in groſſe, and not by reaſon of my mannor, and another that hath no right, claimeth the rent, and receives and taketh the ſame rent of my tenant by coertion of diſtreſſe, or by other forme, and diſſeiſeth mee by ſuch taking of the rent; albeit ſuch diſſeiſor dieth ſo ſeiſed in taking of the rent, yet after his death I may well diſtreine the tenant for the rent which was behinde before the deceaſe of the diſſeiſor, and alſo after his deceaſe. And the cauſe is, for that ſuch diſſeiſor is not my diſſeiſor but at my election and will. For albeit he

* *et nient per reaſon de mon mannor*, not in L. and M. nor Roh.

† *claima—claimant meſme*, L. and M. and Roh.

‡ *et receive—a receiver*, L. and M. and Roh.

‖ *deceaſe—diſtreſs*, L. and M. and Roh.

de mon tenant, &c. uncore jeo puiſſoy a touts foits diſtreiner mon tenant pur le rent arere, § iſſint que il eſt a moy forſque ſicome jeo voile ſufferer le tenant eſtre per tant de temps arere † pur paier a moy meme le rent, &c.

he taketh the rent of my tenant, &c. yet I may at all times diſtreine my tenant for the rent behinde, ſo as it is to mee but as if I will ſuffer the tenant to bee ſo long time behinde in payment of the ſame rent unto me, &c.

(3 Rep. 77.)

Sect. 589.

CAR le payment de mon tenant a un auter a que il ne doit pas payer, n'eſt pas diſſeiſin a moy, ne ouſta moy pas de mon rent ſans ma volunt ¶ et ma election, &c. Car coment que jeo puiſſoy aver aſſiſe envers tiel pernor, uncore ceo eſt a mon election, ſi jeo voile prender luy come mon diſſeiſor, ou non. Iſſint tiels diſcents de rents en groſs ne ouſteront pas le ſeignior de diſtreyner, mes a cheſcun temps ils poyent bien diſtreiner pur le rent arere, &c. Et en ceſt caſe ſi apres le diſtreſſe de luy que iſſint torcionſment priſt le rent, jeo graunt per mon fait le ſervice a un auter, et le tenant attourna, ceo eſt aſſets bone, et les ſervices per tiel grant et attournement maintenant ſont en le grantee, &c. Mes autrement eſt lou le rent eſt parcel del manor, et le diſſeiſor moruſt ſeiſie del manor entier, come en le caſe procheine avant eſt dit, &c.

FOR the payment of my tenant to another to whom hee ought not to pay, is no diſſeiſin to me, nor ſhall ouſt me of my rent without my will and election, &c. For although I may have an aſſiſe againſt ſuch pernor, yet this is at my election, whether I will take him as my diſſeiſor, or no. So ſuch [323. b.] diſcents of rents in groſſe ſhall not ouſt the lord of his diſtreſſe, but at any time he may well diſtreyne for the rent behinde, &c. And in this caſe if after the diſtreſſe of him which ſo wrongfully tooke the rent, I grant by my deed the ſervice to another, and the tenaunt attorne, this is good enough, and the ſervices by ſuch grant and attornement are preſently in the grantee, &c. But otherwiſe it is where the rent is parcell of a mannor, and the diſſeiſor dieth ſeiſed of the whole mannor, as in the caſe next before is ſayd, &c.

(2 Rep. 37. 9 Rep. 51. Hob. 322.)

HERE *Littleton* putteth a diverſitie betweene a rent ſervice parcel of a mannor, whereof he had ſpoken before, and a rent ſervice in groſſe. For a man cannot be diſſeiſed of a rent ſervice in groſſe, rent charge, or rent ſecke, by attornement or payment of the rent to a ſtranger, but at his election; for the rule of law is, *Nemo reddıtum alterius invito domino percipere aut poſſidere poteſt*; and our author hath before * taught us what be diſſeiſins of rents ſervices, rents charges, and rents ſecks, and payment to a ſtranger is none of them, but at the lord's election, as our author here ſaith.

* Vid. Sect. 237, 238, 239, 240. (Cro. Car. 505.)

21 E. 3. 4. 1 E. 5. 5. See the authorities there following in the next

"*Pernor*," *i. e.* the taker of my rent. But if the diſſeiſee bring an aſſiſe againſt ſuch a pernor, then he doth admit himſelfe out of poſſeſſion.

"*Diſcents.*"

§ *&c.* added L. and M. and Roh.
† *pur—de*, L. and M. and Roh.
¶ *et—ou ſans*, L. and M. and Roh

"*Diſcents.*" A diſcent of a rent in groſſe bindeth not the right owner but that he may diſtreyne, albeit he admitted himſelfe out of poſſeſſion, and determined his election, as by bringing of an aſſiſe, &c.

If the tenant of the land pay the rent to a ſtranger which hath no right thereunto, and the right owner releaſe to him, this releaſe is good, becauſe he thereby admitted himſelfe to be out of poſſeſſion. But if the tenant had given him any thing in name of attornement, and the right owner had releaſed to him, this releaſe had beene void, becauſe an attornement only can be no diſſeiſin of the rent.

paroſſe. 5 E. 4. 1. 23 H. 3. tit. Aſſ. 439. 21 E. 3. 40. 34. 16 Aſſ. p. 15. 16 E. 3. Releaſe 56. 1 E. 3. 5. F. N. B. 179. E. 15 E. 4. 8. Flet. li. 4. ca 12.

"*Jeo grant per mon fait, &c.*" This alſo proveth, that the right owner is not out of poſſeſſion, and that this grant over is a demonſtration of his election that hee is in poſſeſſion. (Ant. Sect. 541.)

Sect. 590.

(Dyer 94. b.) (Cro. Car. 303.) (8 Rep. 89.)

ITEM, ſi jeo fuc ſeiſie d'un manor, parcel en demeſne, et parcel en ſervice, et jeo done certaine acres del terre, parcel de demeſne de meſme le manor, a un auter en le taile, [324. a.] *rendant a moy et a mes heires un certaine rent, &c. ſi en ceſt caſe jeo fue diſſeiſie de la manor, et touts les tenants atturnont et payont lour rents al diſſeiſor, et auxy le dit tenant en le taile paya le rent per moy reſerve, al diſſeiſor, et puis le diſſeiſor morust ſeiſie, * &c. et ſon heire entra, et eſt eins per diſcent, uncore en ceſt caſe jeo puiſſe bien diſtreigner le tenant en le taile, et ſes heires, pur le rent per moy reſerve ſur le done,* ſcilicet, *auxy-bien pur le rent eſteant aderere devant le deſcent al heire le diſſeiſor, et auxy pur le rent que happa d'eſtre aderere apres meſme le diſcent, nient obſtant tiel morant ſeiſie del diſſeiſor, &c. Et la cauſe eſt, pur ceo que quant home dona tenements † en le taile, ſavant le reverſion a luy, et il ſur le dit done reſerva a luy un rent ou auters ſervices, tout le rent et les ſervices ſont incidents a la reverſion; et quant un home ad un reverſion, il ne puiſſoit eſtre ouſte de ſon reverſion per le fait d'un*

ALSO, if I be ſeiſed of a mannor, parcell in demeſne, and parcell in ſervice, and I give certaine acres of the land, parcell of the demeſne of the ſame mannor, to another in taile, yeelding to mee and to my heires a certaine rent, &c. if in this caſe I be diſſeiſed of the mannor, and all the tenaunts attorne and pay their rents to the diſſeiſor, and alſo the ſayd tenant in taile pay the rent by me reſerved, to the diſſeiſor, and after the diſſeiſor dieth ſeiſed, &c. and his heire enter, and is in by diſcent, yet in this caſe I may wel diſtreyne the tenant in taile, and his heires, for the rent by me reſerved upon the gift, *ſcilicet*, as well for the rent being behinde before the diſcent to the heire of the diſſeiſor, as alſo for the rent which happeth to be behind after the ſame diſcent, notwithſtanding ſuch dying ſeiſed of the diſſeiſor, &c. And the reaſon is, for that when a man giveth lands in taile, ſaving the reverſion to himſelfe, and hee upon the ſayd gift reſerveth to himſelfe a rent or other ſervices, all the rent and ſervices are incident to the reverſion; and when a man

* &c. not in L. and M. nor Roh. † *a un auter* added in L. and M. and Roh.

d'un eſtrange home, ſinon que le tenant ſoit ouſte de ſon eſtate et poſſeſſion, &c. Car ſi longement que le tenant en le taile et ſes heires continuont lour poſſeſſion per force de mon done, cy longement eſt le reverſion en moy et en mes heires: et entant que le rent et les ſervices reſerves ſur tiel done ſont incidents et dependants al reverſion, quecunque que ad le reverſion, avera meſme le rent et ſervices, &c.*

a man hath a reverſion he cannot be ouſted of his reverſion by the act of a ſtranger, unleſſe that the tenaunt be ouſted of his eſtate and poſſeſſion, &c. For as long as the tenant in taile and his heires continue their poſſeſſion by force of my gift, ſo long is the reverſion in me and in my heires: and in as much as the rent and ſervices reſerved upon ſuch gift be incident and depending upon the reverſion, whoſoever hath the reverſion, ſhall have the ſame rent and ſervices, &c.

Sect. 591. [324. b.]

EN meſme le maner eſt, lou jeo leſſa parcel del demeſne de manor a un auter pur terme de vie, ou pur terme d'ans, rendant a moy certaine rent, &c. coment que jeo ſoy diſſeiſie del manor, &c. et le diſſeiſor moruſt ſeiſie, † &c. et ſon heire ‡ eſteant eins per diſcent, uncore jeo diſtreiner pur le rent arere ut ſupra, *nient obſtant tiel diſcent; car quant home ad fait tiel done en taile, ou tiel leas pur terme de vie, ou pur terme d'ans, del parcel de le demeſne de un manor, &c. ſavant le reverſion a tiel donour ou leſſour, &c. et puis il ſoit diſſeiſie de la manor, &c. tiel reverſion apres tiel diſſeiſin eſt ſever del manor en fait, coment que ne ſoit ſever en droit. ‡ Et iſſint poyes veier (mon fits) diverſitie, lou il y ad un manor parcel en demeſne et parcel en ſervices, les queux ſervices ſont parcel de meſne le manor nient incidents a aſcun reverſion, &c. et lou ils ſont incidents al reverſion, &c.*

IN the ſame manner is it, where I let parcell of the demeſnes of the mannor to another for terme of life, or for terme of yeares, rendring to mee a certaine rent, &c. albeit I be diſſeiſed of the mannor, &c. and the diſſeiſor die ſeiſed, &c. and his heire bee in by diſcent, yet I may diſtreine for the rent arere *ut ſupra*, notwithſtanding ſuch diſcent; for when a man hath made ſuch a gift in taile, or ſuch a leaſe for life, or for yeares, of parcell of the demeſnes of a mannor, &c. ſaving the reverſion to ſuch donor or leſſor, &c. and after he is diſſeiſed of the mannor, &c. ſuch reverſion after ſuch diſſeiſin is ſevered from the mannor in deed, though it be not ſevered in right. And ſo thou mayſt ſee (my ſonne) a diverſitie, where there is a mannor parcell in demeſne and parcell in ſervices, which ſervices are parcell of the ſame mannor not incident to any reverſion, &c. and where they are incident to the reverſion, &c.

(Cro. Car. 303. 1 Roll. Abr. 658. 11 Rep. 47, 48. Plowd. 197. b.)

HERE *Littleton* putteth a diverſitie betweene rents and ſervices parcell of a mannor (whereof he had ſpoken before) and rents and ſervices incident to a reverſion parcell of a mannor.

And

* *en ceo cas* added L. and M. and Roh.
† &c. not in L. and M.
‡ *eſteant* not in L. and M. nor Roh.
‡ &c. added L. and M. and Roh.

And the reaſon of this diverſitie is, for that as long as the donee in taile, leſſee for life, or leſſee for yeares, are in poſſeſſion, they preſerve the reverſion in the donor or leſſor; and ſo long as the reverſion continue in the donor or leſſor, ſo long do the rents and ſervices which are incident to the reverſion belong to the donor or leſſor. Neither can the donor or leſſor be put out of his reverſion, unleſſe the donee or leſſee be put out of their poſſeſſion; and if the donee or leſſee be put out of their poſſeſſion, then conſequently is the donor or leſſor put out of their reverſion. But if the donee or leſſee make a regreſſe, and regaine their eſtate and poſſeſſion, thereby doe they *ipſo facto* reveſt the reverſion in the donor or leſſor.

And here is to be obſerved, that when a man is ſeiſed of a mannor, and maketh a gift in taile, or leaſe for life, &c. of parcell of the demeſne of the mannor, [*a*] the reverſion is part of the mannor, and by the grant of the mannor the reverſion ſhall paſſe with the attornement of the donee or leſſee. But if the lord make a gift in taile, or a leaſe for life of the whole mannor, excepting *Blacke-Acre*, parcell of the demeſnes of the mannor, and after he granteth away his mannor; *Blacke-Acre* ſhall not paſſe; becauſe [325. a.] during the eſtate taile, or leaſe for life, it is ſevered from the mannor. And ſo note a diverſitie, that a reverſion of part may be parcell of a mannor in poſſeſſion, but a part in poſſeſſion cannot be parcell of the reverſion of a mannor expectant upon any eſtate of freehold. But if a man make a leaſe for yeares of a mannor, excepting Blacke Acre, and after granteth away the mannor, Blacke Acre ſhall paſſe, becauſe the freehold being entire, it remaineth parcell of the mannor, and one *præcipe* of the whole mannor ſhall ſerve. But otherwiſe it is in caſe of the gift in taile or leaſe for life excepting any part, there muſt be ſeverall writs of *præcipe*, becauſe the freehold is ſeverall.

[*a*] 18 Aſſ. p. 2. 38 H. 6. 33. Pl. Com. Fulmerſtone's caſe, 103. Lib. 5. fol. 11, 12. 25. 19 E. 2. Briefe 845. 4 E. 3. Briefe 713. (Poſt. 349. 11 Rep. 50. b.)

CHAP. 11. Of Diſcontinuance. Sect. 592.

DISCONTINUANCE eſt un ancient parol en la ley, et ad divers ſignifications, &c. Mes quant a un entent il ad tiel ſignification, ſcilicet, ſou un home ad alien a un auter certaine terres ou tenements et moruſt, et un auter ad droit de aver meſmes les terres ou tenements, mes il ne poit enter en eux per cauſe de tiel alienation, &c.

DISCONTINUANCE is an ancient word in the law, and hath divers ſignifications, &c. But as to one intent it hath this ſignification, *viz.* where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the ſame lands or tenements, but hee may not enter into them becauſe of ſuch an alienation, &c.

Vide Sect. 637. "*DISCONTINUANCE*" is a word compounded of *de* and *continuo*, for *continuare* is to continue without intermiſſion. Now by addition of *de* (*euphoniæ gratiâ dis* to it) which is a privative, it ſignifieth an intermiſſion. *Diſcontinuare nihil aliud ſignificat quàm intermittere, deſueſcere, interrumpere.* And as our author ſaith, [*a*] it is a very ancient word in law (1).

[*a*] 8 H. 4. 8. b. 11 H. 4. 85. b.

(10 Rep. 97.) A diſcontinuance of eſtates in lands or tenements is properly (in legall underſtanding) an alienation made or ſuffered by tenant in taile, or by any that is ſeiſed in *auter droit*, whereby the iſſue in taile, or the heire or ſucceſſor, or thoſe in reverſion or remainder, are driven to their action, and cannot enter.

All which is implied by the deſcription of our author, and by the (*&c.*) in the end of this Section.

I have added (properly) by good warrant of our author himſelfe, for *Sectione* 470. he uſeth diſcontinuance for a devefting or diſplacing of a reverſion, though the entrie be not taken away.

(1 Roll. Ab. 130. 485.) This diſcontinuance conſiſteth in doing or ſuffering an act to be done, as hereafter ſhall appeare. And where our author ſaith, that it hath divers ſignifications, there is alſo a diſcontinuance of proceſſe conſiſting in not doing, where the proceſſe is not continued, concerning which there is an excellent ſtatute made in furtherance of juſtice in [*b*] 1 *E.* 6. and is well expounded in my Reports, and therefore need not here to be inſerted.

[*b*] Vide the Statutes of 1 E. 6. ca. 7. & 31 Elis. c. 1. lib. 7. f. 30, 31, &c. le caſe de diſcontinuance de proces. (1 Sid. 173. 2 Cro. 284.) 39 E. 3. 7. a. 46 E. 3. 30. 37 H. 6. 25, 26. 9 E. 4. 18. 12 E. 4.

There is another erroneous proceeding, and that conſiſteth in miſdoing; as when one proceſſe is awarded inſtead of another, or when a day is given which is not legall, this is called a miſcontinuance, and if the tenant or defendant make default, it is error; but if he appeare, then the miſcontinuance is ſalved, otherwiſe it is of a diſcontinuance. But let us returne to the diſcontinuance of eſtates in lands, whereof *Littleton* doth treat in this Chapter.

Vide Sect. 74. 174. 194. 441. 520. "*Significations.*" Here (as in many other places) it appeareth how neceſſary it is to know the ſignification of words.

And in this Chapter it appeareth, that when *Littleton* wrote, the eſtate in lands and tenements might have beene diſcontinued five manner of wayes, *viz.* by feoffment, by fine, by releaſe with warrantie,

rantie, confirmation with warrantie, and by ſuffering of a recovery in a *præcipe quòd reddat*. And this was to the prejudice [325. b.] of five kinds of perſons, *viz.* of wives, of heires, of ſucceſſors, of thoſe in reverſion, and of thoſe in remainder. But for wives, and their heires, and for ſucceſſors, the law is altered by acts of parliament ſince *Littleton* wrote, as in this Chapter in their proper places ſhall appeare.

Sect. 593.

*SICOME un abbe ſeiſie de certaine terres ou tenements en fee, et alienaſt meſmes les terres ou tenements a un auter en fee, ou en fee taile, ou pur terme de vie, et * puis l'abbe moruſt, ſon ſucceſſor ne poit enter en les dits terres ou tenements, coment que il ad droit eux aver come en droit de ſon meaſon, mes il eſt mis a ſon action de recoverer meſmes les terres ou tenements, quel eſt appelle,* breve de ingreſſu ſine aſſenſu capituli, &c. †

AS if an abbot be ſeiſed of certaine lands or tenements in fee, and alieneth the ſame lands or tenements to another in fee, or in fee taile, or for terme of life, and after the abbot dieth, his ſucceſſor cannot enter into the ſaid lands or tenements, albeit he hath right to have them as in right of his houſe, but he is put to his action to recover the ſame lands or tenements, which is called a writ, *breve de ingreſſu ſine aſſenſu capituli, &c.*

HERE *Littleton* putteth an example of a diſcontinuance made by one ſeiſed in *auter droit*, as by an abbot who had a fee ſimple in the right of his monaſtery, and therefore his alienation without the aſſent of his covent had beene a diſcontinuance at the common law, and had driven his ſucceſſor to a writ *de ingreſſu ſine aſſenſu capituli*.

"*De ingreſſu ſine aſſenſu capituli, &c.*" It is called ſo becauſe the alienation was *ſine aſſenſu capituli*; for if it had beene *cum aſſenſu capituli*, it ſhould have beene a barre to the ſucceſſor. And becauſe the ſucceſſor could not enter, the common law gave him this writ, and is ſo called of theſe words contained in the writ, which writ you may read in the Regiſter, and *Fitzherbert's N. B.* Regiſt. Orig. fo. 230. F. N. B. 195. Bracton li. 4. fol. 323. Fleta lib. 5. ca. 34.

And here is to be noted, that in law the covent, albeit they be regular and dead perſons in law, yet are they ſaid in law to be *capitulum* to the abbot, as well as the deane and chapter, that be ſecular to the biſhop. But it is to be obſerved and implied in this (*&c.*) that, a ſole body politike that hath the abſolute right in them, as an abbot, biſhop, and the like, may make a diſcontinuance; but a corporation aggregate of many, as deane and chapter, warden and chaplaines, maſter and fellowes, maior and comminaltie, &c. cannot make any diſcontinuance; for if they joyne, the grant is good; and if the deane, warden, maſter, or maior make it alone where the body is aggregate of many, it is void, and worketh a diſſeiſin. But now 21 E. 4. 26. (Plo. 536.) (Ant. 85. a.) (Poſt. 341. b.) (11 Rep. Magdalen College's caſe.)

* *puis* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

See more of this matter hereafter in this chapter, Sect. 648, and before Sect. 528.

now (as hath beene ſaid) by the ſtatute of 27 *H.* 8. and 31 *H.* 8. all the abbots, priors, and other religious perſons are ſo diſſolved, as there be none remaining this day, and by the ſtatutes of 1 *Eliz.* and 13 *Eliz. cap.* 10. and 1 *Jac. cap.* 3. biſhops and all other eccleſiaſticall perſons are diſabled to alien or diſcontinue any of their eccleſiaſticall livings, as by the ſame acts doth appeare (1).

Sect. 594.

*ITEM, ſi home ſeiſie de terre come en droit de ſa feme, * &c. et ent enfeoffa un auter, † &c. et moruſt, la feme ne puit enter, mes eſt mis a ſon action, lequel eſt appel*, cui in vitâ, &c.

ALSO, if a man be ſeiſed of land as in right of his wife, &c. and thereof infeoffe another, &c. and dieth, the wife may not enter, but is put to her action, the which is called, *cui in vitâ, &c.*

"*EN droit ſa feme, &c.*" (2) That is to ſay, in fee ſimple, fee taile, or for life. Here *Littleton* putteth another caſe where a man is ſeiſed in *auter droit*, and may make a diſcontinuance, as the huſband ſeiſed in the right of his wife, and therefore the common law gave her a *cui in vitâ*, and her heire a *ſur cui in vitâ*, becauſe they could not enter. But this is altered ſince our author wrote, by the ſtatute of 32 *H.* 8. by the purview of which ſtatute, the wife and her heires after the deceaſe of her huſband may enter into the lands or tenements of the wife, notwithſtanding the alienation of her huſband. [326. a.]

Bracton lib. 4. f. 262. & 22 & 324. Fleta lib. 6. ca. 34 & 36. F. N. B. 193. Regiſt. 32 H. 8. cap. 28.

And here is one of the alienations to make a diſcontinuance, viz. a feoffment; and where our author ſpeaketh of a huſband ſeiſed in the right of his wife, ſo it is where the huſband and wife are joyntly ſeiſed to them and their heires of an eſtate made during the coverture, and the huſband make a feoffment in fee, and dieth, the wife now may enter within that ſtatute, although it was the inheritance of them both. And ſo it is if the feoffment be made by the huſband and wife, (albeit the words of the ſtatute be by the huſband only) for in ſubſtance this is the act of the huſband only (1).

(1 Roll. Abr. 634. Ant. 187. b.)

Dier. 4 & 5. Ph. & Marie 146. 3 Eliz. Dier. 191. Lib. 8. fol. 71, 72. Greveleye's caſe. (9 Rep. 140. a.) Greveleye's caſe ubi ſupra. (2 Inſt. 343.)

If the huſband cauſe a *præcipe quòd reddat* upon a faint title to be brought againſt him and his wife, and ſuffereth a recovery without any voucher, and execution to be had againſt him and his wife, yet this is holpen by the ſtatute; for this by like conſtruction is the act of the huſband, and the words of the ſtatute be, *made, ſuffered*, or *done*.

(F. N. B. 206. f. 7 Rep. 42. 9 Rep. 29.)

If the huſband make a feoffment in fee of the lands which he holdeth in the right of his wife, and after they are divorced *cauſâ præcontractûs*, yet the woman may enter within the purview of that ſtatute, and is not driven to her writ of *cui ante divortium*, as ſhe was

* &c. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) [See Note 279.]

(2) [See Note 280.]

[326. a.]

(1) But a fine levied both by huſband and wife of her lands is not within the ſtatute; and it operates as a bar to her and her heirs of all her eſtate and intereſt in the land. See 2 Rep. 57. b. 77. b.

was at the common law, albeit the entrie be by the ſtatute given to the wife, and now upon the matter ſhe was never his lawfull wife. But it ſufficeth that ſhe was his wife *de facto* at the time of the alienation, and where her huſband dieth ſhe cannot be his wife at the time of the entrie.

If the huſband levie a fine with proclamations, and dieth, the wife muſt enter or avoid the eſtate of the conuſee within five yeares, or elſe ſhe is barred for ever by the ſtatute of 4 *H.* 7. for the ſtatute of 32 *H.* 8. doth helpe the diſcontinuance but not the barre; and the ſtatute ſpeaketh of a fine, and not of a fine with proclamations.

6 E. 6. Dier. 72. b.

4 H. 7. c. 24.

If lands be given to the huſband and wife, and to the heires of their two bodies, and the huſband maketh a feoffment in fee and dieth, the wife is holpen by the ſaid ſtatute, as hath beene ſaid, and ſo is the iſſue of both their bodies. Feme tenant in taile taketh huſband, the huſband maketh a feoffment in fee, the wife before entrie dieth without iſſue, he in the reverſion or remainder may enter. For, firſt, the reverſion or remainder cannot be diſcontinued in this caſe, becauſe the eſtate taile is not diſcontinued. Secondly, the words of the ſtatute be, *ſhall not be prejudiciall or hurtfull to the wife or her heires, or ſuch as ſhall have right title or intereſt by the death of ſuch wife, but that the ſame wife and her heires, and ſuch other to whom ſuch right ſhall appertaine after her deceaſe, ſhall or lawfully may enter into all ſuch mannors, lands, &c. according to their rights and titles therein:* by which words the entrie of him in the reverſion or remainder in that caſe is preſerved. The huſband is tenant in taile, the remainder to the wife in taile, the huſband make a feoffment in fee; by this the huſband by the common law did not only diſcontinue his owne eſtate taile, but his wife's remainder: but at this day after the death of the huſband without iſſue, the wife may enter by the ſaid act of 32 *H.* 8. If the huſband hath iſſue, and maketh a feoffement in fee of his wife's land, and the wife dieth, the heire of the wife ſhall not enter during the huſband's life, neither by the common law nor by the ſtatute.

Greveleye's caſe ubi ſupra. Pach. 7 Jac. (Hob. 261. 9 Rep. 140.) (Dyer. 224. a. 3 Inſt. 216.)

8 E. 2. tit. cui in vita 26. 34 E. 1. ibidem 30. 10 E. 3. 12 Dier. 21 Eliz. 368.

Cui in vitâ, &c. Here is alſo implied a *ſur cui in vitâ* alſo for the heire. This writ here mentioned in our author is ſo called of thoſe words contained in the writ, which you may reade in the Regiſter and *Fitzherbert's N. B.*

[886. b.]

Sect. 595.

ITEM, ſi tenant en taile de certaine terre ent enfeoffa un auter, &c. et ad iſſue et moruſt, ſon iſſue ne poit pas enter en la terre, coment que il ad title et droit a ceo, mes eſt mis a ſon action, que eſt appel formedon *en le diſcender, &c.*

ALSO, if tenant in taile of certaine land thereof enfeoffe another, &c. and hath iſſue and dieth, his iſſue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a *formedon in le diſcender, &c.* (1)

" *ENFEOFFA*

(1) [See Note 281.]

"*ENFEOFFA un auter, &c.*" Here is implied, or make a gift in taile or an eſtate for life. Here *Littleton* putteth a third example of a diſcontinuance made by tenant in taile ſo as his iſſue is put to his *formedon* in the diſcender, which is given to the iſſue in taile by the ſtatute of 13 *E.* 1. *cap.* 1. becauſe he cannot enter.

Fleta lib. 5. cap. 34. F. N. B. 211, 212. Regiſt. (4 Rep. 3. b. Poſt. 365. b.)

"*Tenant en taile.*" This extendeth as well to a woman tenant in taile as to a man, and was generally good law when *Littleton* wrote; but now by the ſtatute of [*d*] 11 *H.* 7. if the woman hath any eſtate in taile joyntly with her huſband, or only to her ſelfe, or to her uſe in any lands or hereditaments of the inheritance or purchaſe of her huſband, or given to the huſband and wife in taile by any of the anceſtors of the huſband, or by any other perſon ſeiſed to the uſe of the huſband or his anceſtors, and ſhall hereafter being ſole, or with any other after taken huſband diſcontinue, &c. the ſame; every ſuch diſcontinuance ſhall be void; and that it ſhall be lawfull for every perſon to whom the intereſt, title, or inheritance, after the deceaſe of the ſaid woman ſhould appertaine, to enter, &c. So as if ſuch a feme tenant in taile doe make any diſcontinuance in fee, in taile, or for life, although it be without warrantie, yet this doth not take away the entry after her death, either of the iſſue or of him in reverſion or remainder. This ſtatute hath beene excellently expounded by divers reſolutions and judgements [*e*] which I have quoted in the margent, and are worthy of due obſervation.

[*d*] 11 H. 7. ca. 20. Vide Sect. 697. (3 Cro. 244. 1 Rep. 102. b. 3 Rep. Lin. Coll. Caſe. 10 Rep. 39. b. 6 Rep. 9. b. Bend. 40. Hob. 332. Jo. 31. Cro. El. 2.)

[*e*] Lib. 3. fol. 50, 51. Sir George Browne's caſe eodem lib. fol. 60, &c. Linc. Coll. caſe. Lib. 1. fol. 176. Mildemaye's caſe. Dier 3 & 4. Ph. & Mar. 146. Idem 8 Eliz. 248. 17 Eliz. 340. Idem 19 Eliz. 354. Idem 20 Eliz. 362. 27 H. 8. 23. Lib. 5. fol. 79. Fitzh. caſe. Lib. 6. fol. 71, 72. Grevelcye's caſe (F. N. B. 211. 217. 8 Rep. 88.)

If lands were entailed to a man and to his wife, and to the heires of their two bodies, and the huſband had made a feoffment in fee and died, and then the wife died, this had beene a diſcontinuance at the common law: for the title of the iſſue is as heire of both their bodies, and not as heire to any one of them, and his entrie muſt enſue his title or action.

"*De formedon.*" *De formâ donationis*, ſo called becauſe the writ doth comprehend the forme of the gift. And there be three kinde of writs of formedon, *viz.* The firſt in the diſcender to be brought by the iſſue in taile, which claime by diſcent *per formam doni.* The ſecond is in the reverter, which lieth for him in the reverſion or his heires or aſſignes after the ſtate taile be ſpent. The third is the remainder, which the law giveth to him in the remainder, his heires or aſſignes, after the determination of the eſtate taile; of all which you may reade in the Regiſter and *F. N. B.*

Here *Littleton* ſheweth that the iſſue in taile ſhall have a formedon in the diſcender. What other actions tenant in taile may have, and not have, is good to be ſeene.

[*a*] Tenant in taile ſhall have a *quòd permittat.*

[*b*] Tenant in taile ſhall have a writ of cuſtomes and ſervices *in le debet, et ſolet*, but ſhall not have it in the *debet* only.

[*c*] In like manner he ſhall have a *ſecta ad molendinum in le debet et ſolet*, but not in the *debet tantum.*

[*d*] Tenant in taile ſhall have a writ of *entre in conſimili caſu* and an *admeſurement*, and a *nativo habendo*, *ceſſavit*, *eſcheat*, *waſte*, and the like.

[*c*] But tenant in taile ſhall not have a writ of right *ſur diſclaymer*, nor a *quo jure*, nor a *ne injuſte vexes*, nor a *nuper obiit*, or *rationabile parte*,

[*a*] 4 E. 3. 38. 43 E. 3. 25. 9 E. 4. 25. F. N. B. 124. [*b*] 2 E. 2. Droit 28. [*c*] F. N. B. 123. [*d*] 21 E. 3. 11. 5 E. 3. 23. 11 H. 4. 49. [*e*] 2 E. 3. Droit. 28. 13 H. 7. 24.

parte, nor a *mordanceſter*, nor a *ſur cui in vitâ*; for theſe and the like, none but tenant in fee ſhall have; and the higheſt writ that a tenant in taile can have is a formedon. 5 E. 4. 2. 20 E. 3. Avowrie 131. F. N. B. 10. 46 E. 3. tit. cui in vita, 38.

[327. a.]

Sect. 596.

*ITEM, ſi ſoit tenant en le taile, le reverſion eſteant al donor et a ſes heires, ſi le tenant fait feoffment, *&c. et moruſt ſans iſſue, celuy en le reverſion ne poit enter, mes eſt mis a ſon action de* formedon *en le reverter.*†

ALSO, if there bee tenant in taile, the reverſion being to the donor and his heires, if the tenant make a feoffment, &c. and die without iſſue, hee in the reverſion cannot enter, but is put to his action of *formedon in le reverter* (1).

Sect. 597.

EN meſme le manner eſt, lou tenant en le taile ‡ ſeiſie de certaine terre dont le remainder eſt a un auter en le taile, ou a un auter en fee. Si le tenant en le taile alienaſt en fee, ou en fee taile, ‖ et puis deviaſt ſans iſſue, ceux en le remainder ne poient enter, mes ſont mis a lour briefe de formedon *en le remainder, &c. et pur ceo que per force de tielx feoffments et alyenations en les caſes avauntdits, et en ſemblables § caſes, ceux queux ont title et droit apres la mort de tiel feoffour ou alienour ne poient pas enter, mes ſont miſes a lour actions,* ut ſupra; *et pur ceo cauſe tiels feoffments et alienations ſont appels diſcontinuances.*

IN the ſame manner is it, where tenant in taile is ſeiſed of certaine land whereof the remainder is to another in taile, or to another in fee. If the tenant in taile alien in fee, or in fee-taile, and after die without iſſue, they in the remainder may not enter, but are put to their writ of *formedon* in the remainder, &c. (2) and for that that by force of ſuch feoffments and alienations in the caſes aforeſaid, and the like caſes, they that have title and right after the death of ſuch a feoffor or alienor may not enter, but are put to their actions, *ut ſupra*; and for this cauſe ſuch feoffments and alienations are called diſcontinuances.

"*FAIT feoffment, &c.*" Here is implied fee ſimple, fee taile, or eſtate for life; and in this and the next Section *Littleton* putteth two caſes, where if the iſſues in taile faile, they in the reverſion and remainder are driven to their *formedon* in reverſion or remainder; and this remaineth as it was when *Littleton* wrote, not altered by any ſtatute. And the reaſon whereof theſe alienations in the ſeverall caſes in this and the next Section doe make a diſcontinuance, (F. N. B. 215.)

* *&c.* not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.
‡ *ſeiſie* not in L. and M. nor Roh.
‖ *&c.* added L. and M. and Roh.
§ *autres* added L. and M. and Roh.

(1) [See Note 282.] (2) [See Note 283.]

tinuance, and put him in the reverſion or remainder that right had to his action, and tooke away his entry, was, for that he was privy in eſtate, and for the benefit of the purchaſor, and for the ſafeguard of his warrantie, ſo as every man's right might be preſerved, viz. to the demandant for his ancient right, and to the feoffee for the benefit of his warrantie, which was founded upon great reaſon and equitie: which benefit of the warrantie ſhould be prevented and avoided if the entrie of him that right had were lawfull, and thereby alſo the danger that many times happeneth by taking of poſſeſſions was warily prevented by law. But then it may be demanded, ſeeing that there was no reverſion or remainder expectant upon any eſtate taile at the common law, nor the iſſue in taile had any remedy by the common law, if the tenant in taile had alienes, then by what law is the alienation of tenant in taile a diſcontinuance at this day to the iſſue in taile, or to him in reverſion or remainder? Whereunto it is thus anſwered, that it is provided by the ſtatute of *W.* 2. *ca.* 1. *De donis conditionalibus, quòd non habeant illi quibus tenementum ſic fuerit datum poteſtatem alienandi, &c.* Upon theſe words the ſages of the law have conſtrued the ſaid Act according to the rule and reaſon of the common law, and that in divers and ſundry variable manners. For ſome alienations of tenant in taile, they have adjudged voydable by the iſſue in taile by action only: ſome at the election of the iſſue in taile to avoid it by action, entry, or claime: ſome are meerely void by the death of the tenant in taile: which ſeverall conſtructions were made upon the ſelfe-ſame words aforeſaid. [327. b.]

As for example, If tenant in taile make a feoffement in fee, this drives the iſſue in taile to his action, which is called in law a Diſcontinuance; and this conſtruction was made, for that at the common law the feoffement of an abbot or biſhop, or of the huſband ſeiſed in the right of his wife, did worke a diſcontinuance, and did drive the ſucceſſor and the wife to their action, and foreclоſed them of their entrie: and as the entrie of the iſſue was taken away, ſo conſequently of them in reverſion and remainder. Alſo if an abbot, biſhop, or huſband in the right of his wife, ſeiſed of a rent, or of any other inheritance that lieth in grant, had alienes, it was in the election of the ſucceſſor or wife after the death of her huſband to claime the rent, &c. or to bring an action, for that alienation did not worke a diſcontinuance; and ſo it is by conſtruction in caſe of tenant in taile. Laſtly, if the abbot, biſhop, or huſband, had granted a rent newly created out of the land, &c. to another in fee, this had utterly ceaſed by their death; and ſo it is alſo by conſtruction in caſe of tenant in taile. So as theſe words (*non habent poteſtatem alienandi*) doe worke theſe effects, viz. as to lands, that a feoffment barreth not the iſſue, &c. of his action, but worketh a diſcontinuance to barre him of his entrie: as to rents or any thing *in eſſe*, that lie in grant, that the ſaid words doe take away his power to make any diſcontinuance: as to rents, &c. newly created, that they take away his power to make them to continue longer than during his life.

But there is a diverſitie betweene an alienation working a diſcontinuance of an eſtate which taketh away an entrie, and an alienation working, diveſting or diſplacing of eſtates which taketh away no entry. As if there be tenant for life, the remainder to *A.* in taile, the remainder to *B.* in fee, if tenant for life doth alien in fee, this

Vide Sect. 592. 597. 601. 637, 638.
(F.N.B. 217.b.)
(6 Rep. 3.)
30 E. 1. Formedon 65.
19 E. 2. Formedon 61.
18 E. 3. 46.
12 E. 4. 3.
(Cro. Car. 405.)
(1 Roll. Abr. 632.)
(Poſt. 356. a.)
(Sid. 83.)
(Ant. 301.)
18 E. 3. 12.
19 E. 3. Bre. 468.
24 E. 3. 28.
36 Aſſ. 8.
22 R. 2. Diſcon. 50.
5 E. 4. 3.
4 H. 7. 17.
33 E. 3. Formedon, 47.
& 13 H. 7. Pl. Com. 426.
Smith & Stapleton's caſe.
(3 Rep. 85.)
(1 Leo. 66.)
(Plo. 437.)

this doth diveſt and diſplace the remainders, but worketh no diſcontinuance. And therein it is to be obſerved, that to everie diſcontinuance there is neceſſary a diveſting, or diſplacing of the eſtate, and turning the ſame to a right: for if it be not turned to a right, they that have the eſtate cannot be driven to an action. And that is the reaſon that ſuch inheritances as lie in grant, cannot by grant be diſcontinued, becauſe ſuch a grant diveſteth no eſtate, but paſſeth onely that which he may lawfully grant, and ſo the eſtate itſelfe doth deſcend, revert, or remaine, as ſhall be ſaid hereafter in this Chapter.

A. maketh a gift in taile to *B.* who maketh a gift in taile to *C.* *C.* maketh a feoffment in fee and dieth without iſſue, *B.* hath iſſue and dieth, the iſſue of *B.* ſhall enter; for albeit the feoffment of *C.* did diſcontinue the reverſion of the fee ſimple which *B.* hath gained upon the eſtate taile made to *C.* yet could it not diſcontinue the right of intaile which *B.* had, which was diſcontinued before: and therefore when *C.* died without iſſue, then did the diſcontinuance of the eſtate taile of *B.* which paſſed by his liverie, ceaſe, and conſequently the entrie of the iſſue of *B.* lawfull; which caſe may open the reaſon of many other caſes. (10 Rep. 95.)

Alſo note, that a diſcontinuance made by the huſband did take away the entrie only of the wife and her heires by the common law, and not of any other which claimed by title paramount above the diſcontinuance. As if lands had beene given to the huſband and wife, and to a third perſon, and to their heires, and the huſband had made a feoffment in fee, this had beene a diſcontinuance of the one moitie, and a diſſeiſin of the other moitie: if the huſband had died, and then the wife had died, the ſurvivor ſhould have entred into the whole, for hee claimed not under the diſcontinuance, but by title paramount from the firſt feoffor; and ſeeing the right by law doth ſurvive, the law doth give him a remedie to take advantage thereof by entry, for other remedie for that moitie he could not have.

"*Fee, ou fee taile.*" And ſo it is of an eſtate for life.

Sect. 598.

ITEM, ſi tenant en taile ſoit diſſeiſie, et il releſſa per ſon fait a le diſſeiſor et a ſes heires [328. a.] *tout le droit lequel il ad en meſme les tenements, ceo n'eſt pas diſcontinuance, pur ceo que rien de droit paſſa al diſſeiſor forſque pur terme de vie del tenant en le taile que fiſt le releaſe, &c.*

ALSO, if tenant in taile be diſſeiſed, and he releaſe by his deed to the diſſeiſour and to his heires all the right which he hath in the ſame tenements, this is no diſcontinuance, for that nothing of the right paſſeth to the diſſeiſor, but for terme of the life of tenant in taile which made the releaſe, &c.

(2 Rep. 31.)

Sect. 599.

MES per feoffment del tenant en le taile, fee ſimple paſſa per meſme le feoffement per force de liverie de ſeiſin, &c.

BUT by the feoffment of tenant in taile, fee ſimple paſſeth by the ſame feoffment by force of the liverie of ſeiſin, &c.

Sect. 600.

MES per force d'un releaſe rien paſſera forſque le droit que il poet loyalment et droituralment releſſer, ſans leyde ou damage as auters perſons queux ent averont droit apres ſon deceaſe, &c. Iſſint il eſt grannd diverſity perenter un feoffement d'un tenant en le taile, et un releaſe fait per tenant en le taile.

BUT by force of a releaſe nothing ſhall paſſe but the right which he may lawfully and rightfully releaſe, without hurt or dammage to other perſons who ſhall have right therein after his deceaſe, &c. So there is great diverſitie betweene a feoffement of tenant in taile, and a releaſe made by tenant in taile.

OUR author having put examples of eſtates paſſing by tranſmutation of an eſtate and poſſeſſion, doth in this and the two Sections following put a diverſitie betweene a feoffment and a releaſe or confirmation of a bare right: for it is a rule in law, that the diſſeiſee or any other that hath a right only by his releaſe or confirmation, cannot make any diſcontinuance, becauſe nothing can paſſe thereby but that which may lawfully paſſe. But otherwiſe it is of a feoffment in reſpect of the liverie of ſeiſin, for that it is the moſt ſolemne and common aſſurance in the country, and to be maintained for the common quiet of the realme: and by the feoffment the freehold (which is ſo much eſteemed in law) doth paſſe by open liverie to the feoffee, and by the releaſe a bare right.

9 E. 4. 18.
12 E. 4. 11.
5 H. 4. 8.
21 H. 6. 52.
(Poſt. 329, 330.)

Sect. 601.

*MES il eſt dit, que ſi le tenant en taile en ceſt cas releſſa a ſon diſſeiſor, et oblige luy et ſes heires a garrantie, * et moruſt, et ceſt garranty diſcendiſt a ſon iſſue, † veo eſt diſcontinuance per cauſe de le garrantie ‡.*

BUT it is ſaid, that if the tenant in taile in this caſe releaſe to his diſſeiſor, and bind him and his heires to warrantie, and dieth, and this warrantie deſcend to his iſſue, this is a diſcontinuance by reaſon of the warrantie.

* *&c.* added L. and M. and Roh.
† *donques* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.

THE

THE reaſon why the addition of the warrantie in this caſe maketh a diſcontinuance, is that which hath beene ſaid, *viz.* If the iſſue in taile ſhould enter, the warrantie (which is ſo much favoured in law) ſhould be deſtroyed: and therefore to the end that [328. b.] if aſſets in fee ſimple doe deſcend, he to whom the releaſe is made, may plead the ſame, and barre the demandant: by which meanes all rights and advantages are ſaved. And that I may note it once for all, an (*il eſt dit*) with *Littleton* is as good as a *conceſſum* in a booke caſe.

8 H. 4. 9. 22 R. 2. Diſcon. 50. 12 E. 4. 11. 21 H. 7. 9. 43 E. 3. 8. 15 E. 4. tit. Diſcon. 80. Vi. Sect. 596. 602. 637. 658. (3 Rep. 85.) (Poſt. 632, 633.)

Sect. 602.

MES ſi un home ad iſſue fits per ſa feme, et ſa feme moruſt, et puis il prent auter feme, et tenements ſont dones a luy et a ſa ſecond feme, et a les heires de lour deux corps engendres, et ils ont iſſue un auter fits, et le ſecond feme moruſt, et puis le tenant en le taile eſt diſſeiſie, et il releſſa al diſſeiſor tout ſon droit, &c. et oblige luy et ſes heires a le garrantie, &c. et devia, ceo n'eſt pas diſcontinuance al iſſue en le taile per le ſecond feme, mes il poit bien enter § pur ceo que le garrantie diſcendiſt a ſon eigne frere que ſon pier avoit per le primer feme, ‖ &c.

BUT if a man hath iſſue a ſonne by his wife, and his wife dieth, and after hee taketh another wife, and tenements are given to him and to his ſecond wife, and to the heires of their two bodies engendred, and they have iſſue another ſonne, and the ſecond wife dieth, and after the tenant in taile is diſſeiſed, and hee releaſe to the diſſeiſor all his right, &c. and bind him and his heires to warrantie, &c. and die, this is no diſcontinuance to the iſſue in taile by the ſecond wife, but he may well enter, for that the warrantie deſcendeth to his elder brother which his father had by the firſt wife, &c.

Sect. 603.

(8 Rep. 86.)

EN meſne le manner eſt, lou tenements ſont diſcendable a le fits puiſne ſolonques le cuſtome de Burgh Engliſh, queux ſont entailes, &c. et le tenant en le taile ad deux fits, et eſt diſſeiſie, et il releſſa a ſon diſſeiſor tout ſon droit ove garrantie, &c. et moruſt, le puiſne fits poit enter ſur le diſſeiſor, nient obſtant le garrantie, pur ceo que le garrantie diſcendiſt al eigne fits: car touts foits le garrantie [329. a.] *diſcendera a celuy que eſt heire per le common ley.*

IN the ſame manner is it, where lands are deſcendible to the youngeſt ſonne after the cuſtome of Burrough-Engliſh, which are entayled, &c. and the tenaunt in taile hath two ſonnes, and is diſſeiſed, and he releaſeth to his diſſeiſour all his right with warrantie, &c. and dieth, the younger ſonne may enter upon the diſſeiſor, notwithſtanding the warranty, for that the warrantie deſcendeth to the elder ſon: for alwayes the warrantie ſhall deſcend to him who is heire by the common law.

§ *&c.* added L. and M. and Roh.

‖ *&c.* not in L. and M. nor Roh.

BY theſe two examples in this and the Section next following, it appeareth that a warrantie being added to a releaſe or confirmation, and deſcending upon him that right hath to the lands, maketh a diſcontinuance; otherwiſe it is out of the reaſon of the law, and worketh no diſcontinuance, if the warrantie deſcendeth upon another.

"*Ove garrantie, &c.*" Here is implied that he doth binde him and his heires to warrant to the releaſee and his heires.

13 H. 4. Garrantie 94. 19 R. 2. Garrantie 100. (Poſt. 376. a.)

"*Touts foits le garrantie diſcendiſt ſur le heire al common ley.*" This is a maxime of the common law, and hereof more ſhall be ſaid in the Chapter of Warrantie, *Sectione* 718. 735, 736, 737. ſo as it is not the warrantie only that maketh a diſcontinuance, but the warrantie and the diſcent upon him that right hath together.

Sect. 604.

ITEM, ſi un abbe ſoit diſſeiſie, et il releſſa a le diſſeiſor oveſque garrantie, ceo n'eſt pas diſcontinuance a ſon ſucceſſor, pur ceo que rien paſſa per cel releas forſque le droit que il ad durant le temps que il eſt abbe, et le garrantie eſt eſpire per ſon privation, ou per ſa mort.

ALSO, if an abbot be diſſeiſed, and hee releaſeth to the diſſeiſor with warrantie, this is no diſcontinuance to his ſucceſſor, becauſe nothing paſſeth by this releaſe but the right which hee hath during the time that he is abbot, and the warrantie is expired by his privation, or by his death.

(3 Rep. 73.)

THE reaſon hereof yeelded by *Littleton* is, for that the warrantie is expired by his privation or death.

"*Per ſon privation, ou per ſa mort.*" Note, that privation is here reſembled to death, and ſo is tranſlation alſo. Wherein this diverſitie is worthy of obſervation, that when a biſhop, &c. make an eſtate, leaſe, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the biſhoprick, &c. which ſhould maintaine the ſucceſſor, there the privation or tranſlation of the biſhop, &c. is all one with his death. But where the biſhop is patron and ordinary, and confirmeth a leaſe made by the parſon without the deane and chapter, and after the parſon dieth, and the biſhop collateth another, and then is tranſlated, yet his confirmation remaineth good; for the revenues that are to maintaine the ſucceſſor are not thereby diminiſhed. And the like diverſitie doth hold in caſe of reſignation, notwithſtanding [*m*] the authoritie to the contrary.

Vide 29 E. 3. 16. (Ant. 300. b.) (Dyer. 356.)

[*m*] 29 E. 3. 16. tit. garrant. 99.

Sect. 605.

ITEM, ſi home ſeiſie en droit ſa feme eſt diſſeiſie, et il releſſa, &c. ove garrantie, ceo n'eſt pas diſcontinuance a la feme, ſi el ſurveſquiſt ſon baron, mes que el poit enter, &c. Cauſa patet.

ALSO, if a man ſeiſed in the right of his wife be diſſeiſed, and he releaſeth, &c. with warrantie, this is no diſcontinuance to the wife, if ſhee ſurviveth her huſband, but that ſhe may enter, &c. *Cauſa patet.*

THIS is evident, unleſſe the wife be heire to the huſband (as by law ſhe may be), and then it is a diſcontinuance for the cauſe aforeſaid.

[329. b.] Sect. 606. (1 Saund. 261.)

*ITEM, ſi tenant en taile de certaine terre leſſa meſme la terre a un auter pur terme des ans, per force de quel le leſſee en eit poſſeſſion, en quel poſſeſſion le tenant en taile per ſon fait releſſa tout le droit que il avoit en meſme le terre, a aver et tener a le leſſee et a ſes heires a touts jours; ceo n'eſt pas diſcontinuance, mes apres le deceaſe le tenant en taile, ſon iſſue poit bien enter, pur ceo que per tiel release riens paſſa forſque pur terme de * la vie de le tenant en le taile.*

ALSO, if tenant in tayle of certaine land letteth the ſame land to another for terme of yeares, by force whereof the leſſee hath thereof poſſeſſion, in whoſe poſſeſſion the tenant in tayle by his deed releaſeth all the right that he hath in the ſame land, to have and to hold to the leſſee and to his heires for ever; this is no diſcontinuance, but after the deceaſe of the tenant in tayle, his iſſue may well enter, becauſe by ſuch releaſe nothing paſſeth but for terme of the life of the tenant in tayle.

"*CAR per tiel releas riens paſſa.*" Here is one of the maximes of the common law rehearſed by our author, whereof he doth put divers examples hereafter.

Sect. 607. (3 Rep. 85. b.)

EN meſme le manner eſt, ſi le tenant en le taile confirma l'eſtate le leſſee pur terme des ans, a aver et tener a luy et a ſes heires, ceo n'eſt pas diſcontinuance, pur ceo que riens paſſa per tiel confirmation forſque l'eſtate que le tenant en le taile avoit pur terme de ſa vie, &c.

IN the ſame manner it is, if the tenant in tayle confirme the eſtate of the leſſee for yeares, to have and to hold to him and to his heires, this is no diſcontinuance, for that nothing paſſeth by ſuch confirmation but the eſtate which the tenant in tayle hath for terme of his life, &c.

* *le—ſes*, L. and M. and Roh.

(Ant. 328.) "*RIENS paſſa per tiel confirmation.*" Here is another of the maximes of the common law rehearſed by our author, whereof he putteth examples hereafter.

More ſhall be ſaid hereof in the next Section following.

Sect. 608.

*ITEM, ſi tenant en taile apres tiel leas granta le reverſion en fee per ſon fait a auter, et voile que apres le terme fine, que meſme le terre remaindroit a le grantee et a ſes heires a touts jours, et le tenant a terme d'ans atturna, ceo n'eſt pas diſcontinuance. Car tiels choſes queux paſſont en tiels caſes de tenant en le taile tantſolement per voy de graunt, ou per confirmation, ou per tiel releaſe, rien poit paſſer pur faire eſtate a celuy a que tiel graunt, ou confirmation, ou releaſe, eſt fait, forſque ceo que le tenant en taile poit droiturelment faire, * et ceo n'eſt forſque pur terme de ſa vie, &c.*

ALSO, if tenant in taile after ſuch leaſe grant the reverſion in fee by his deed to another, and willeth that after the terme [330. a.] ended, that the ſame land ſhall remaine to the grantee and his heires for ever, and the tenant for yeares attorne, this is no diſcontinuance. For ſuch things which paſſe in ſuch caſes of tenant in taile only by way of grant, or by confirmation, or by ſuch releaſe, nothing can paſſe to make an eſtate to him to whom ſuch grant, or confirmation, or releaſe, is made, but that which the tenant in taile may rightfully make, and this is but for terme of his life, &c.

(Ant. 251. b.)

Sect. 609.

CAR ſi jeo leſſa terre a un home pur terme de ſa vie, &c. et le tenant a terme de vie leſſe meſme la terre a un auter pur terme des ans, &c. et puis mon tenant a terme de vie graunta le reverſion a un auter en fee, et le tenant a terme des ans atturna, en ceſt caſe le grantee † n'ad en le franktenement forſque ‡ eſtate pur terme de vie ſon grauntor, &c. et jeo que ſuis en le reverſion de fee ſimple, ne puiſſe enter per force de cel grant del reverſion fait per mon tenant a terme de vie, pur ceo que per tiel grant mon reverſion n'eſt pas diſcontinue, mes tout temps demurt a moy, ſicome il fuit adevant, nient obſtant tiel grant del reverſion fait al grantee, a luy et a ſes heires, &c. pur ceo que rien

FOR if I lett land to a man for terme of his life, &c. and the tenant for life letteth the ſame land to another for terme of years, &c. and after my tenant for life grant the reverſion to another in fee, and the tenant for yeares attorne, in this caſe the grantee hath in the freehold but an eſtate for terme of the life of his grantor, &c. and I which am in the reverſion of the fee ſimple may not enter by force of this grant of the reverſion made by my tenant for life, for that by ſuch grant my reverſion is not diſcontinued, but alwayes remaines unto me, as it was before, notwithſtanding ſuch grant of the reverſion made to the grantee, to him and to his

* *et ceo n'eſt—&c. eſt*, L. and M. and Roh.

‡ *n'ad—ads*, L. and M. and Roh.

† *eſtate* not in L. and M. nor Roh.

riens paſſa per force de tiel grant, forſque eſtate que le grantor avoit, &c.

his heires, &c. becauſe nothing paſſed by force of ſuch grant, but the eſtate which the grantor hath, &c. (1)

[330. b.]

Sect. 610.

(Ant. 328, 329.)

EN meſme le maner eſt, ſi le tenant a terme de vie per ſon fait confirme l'eſtate ſon leſſee pur terme des ans, a aver et tener a luy et a ſes heires, ou releſſa a ſon leſſee et a ſes heires, uncore le leſſee a terme d'ans n'ad eſtate forſque pur terme de vie de le tenant a terme de vie, &c.

IN the ſame manner is it, if tenant for terme of life by his deed confirme the eſtate of his leſſee for yeares, to have and to hold to him and his heires, or releaſe to his leſſee and his heires, yet the leſſee for yeares hath an eſtate but for terme of the life of the tenant for life, &c.

"*CAR tiels choſes que paſſont en tiels caſes de tenant en le taile, &c.*" Here is rehearſed another ancient maxime of the common law touching grants; and hereby it appeareth that a feoffment in fee (albeit it be by *parol*) is of a greater operation and eſtimation in law, than a grant of a reverſion by deed, though it be inrolled, and attornement of the leſſee for yeares of a releaſe, or a confirmation by deed, for the reaſons aforeſaid. And this is manifeſted by the examples which our author here in theſe three Sections putteth.

Sect. 611.

MES autrement eſt quant tenant a terme de vie fait un feoffment en fee, car per tiel feoffment le fee ſimple paſſa. Car tenant a terme d'ans poit faire feoffment en fee, et per ſon feoffment le fee ſimple paſſera, et uncore il n'avoit al temps del feoffment fait forſque eſtate pur terme d'ans, &c.

BUT otherwiſe it is when tenant for life maketh a feoffment in fee, for by ſuch a feoffment the fee ſimple paſſeth. For tenant for yeares may make a feoffment in fee, and by his feoffment the fee ſimple ſhall paſſe, and yet he had at the time of the feoffment made but an eſtate for terme of yeares, &c. (1)

"*FORSQUE eſtate pur terme d'ans, &c.*" Here it is implied, that albeit the feoffment made by leſſee for yeares be a feoffment between the feoffor and feoffee, and that by this feoffment the fee ſimple paſſeth by force of the livery, yet is it a diſſeiſin to the leſſor. And here it is worthy to be obſerved, that our author ſaith, that tenant for terme of yeares may make a feoffment; whereupon it followeth, that the feoffor may thereunto annex a warrantie, whereupon the feoffee may vouch him: but of this you ſhall reade more in the Chapter of Warranties, Sect. 698. (Poſt. 367. a.)

[330. b.]

(1) [See Note 284.] (1) [See Note 285.]

Sect. 612.

*ITEM, ſi tenant en le taile granta ſon terre a un auter pur terme de vie de meſme le tenant en taile, et liverer a luy ſeiſin, &c. et apres per ſon fait il releſſa a le tenant et a ſes heires tout le droit que il avoyt en meſme la terre; en ceſt cas l'eſtate del tenant de la terre n'eſt pas enlarge per force de tiel releas, pur ceo que quant le tenant avoit l'eſtate en le terre pur terme de vie de le tenant en le taile, donque il avoit tout le droit que le tenant en le taile puiſſoit droiturelment granter ou releſſer: * iſſint que per tiel releas nul droit paſſa, entant que ſon droit fuit ale adevant.*

ALSO, if tenant in taile grant his land to another for terme of the life of the ſaid tenant in taile, and deliver to him ſeiſin, &c. and after by his deed hee releaſeth to the tenant and to his heires all the right which hee hath in the [331. a.] ſame land; in this caſe the eſtate of the tenant of the land is not enlarged by force of ſuch releaſe, for that when the tenant had the eſtate in the land for terme of the life of the tenant in taile, hee had then all the right which tenant in taile could rightfully grant or releaſe: ſo as by this releaſe no right paſſeth, inaſmuch as his right was gone before.

(1 Saund. 26. 3 Rep. 84.)

Sect. 613.

ITEM, ſi tenant en le taile per ſon fait grant a un auter tout ſon eſtate que il avoit en les tenements a luy tailes, a aver et tener tout ſon eſtate al auter, et a ſes heires a touts jours, et delivera a luy ſeiſin accordant; en ceſt cas le tenant a que l'alienation fuit fait, n'ad auter eſtate forſque pur terme de vie del tenant en taile. Et iſſint il poit bien eſtre prove, que le tenant en taile ne poit pas graunter ne aliener, ne faire aſcun droiturel eſtate de franktenement a auter perſon, forſque pur terme de ſa vie demeſne, &c.

ALSO, if tenant in taile by his deed grant to another all his eſtate which hee hath in the tenements to him entailed, to have and to hold all his eſtate to the other, and to his heires for ever, and deliver to him ſeiſin accordingly; in this caſe the tenant to whom the alienation was made hath no other eſtate but for terme of the life of tenant in taile. And ſo it may bee well proved that tenant in taile cannot grant nor alien, nor make any rightfull eſtate of freehold to another perſon, but for terme of his owne life only, &c. (1)

(Poſt. 342. b. 343. a. Ant. 263. b.)

THE meaning of *Littleton* in both theſe caſes, in this and in the Section next preceding is, that having regard to the iſſue in taile, and to them in reverſion or remainder, tenant in taile cannot lawfully make a greater eſtate than for terme of his life; and therefore this releaſe or grant is no diſcontinuance. But in regard of himſelfe, this releaſe or grant leaveth no reverſion in him, but puts the ſame in abeiance, ſo as after this releaſe or grant made he ſhall not have any action of waſte, &c.

13 H. 7. 10. a. Brooke Releaſe, 25.

" *Grant*

* *&c.* added L. and M. and Roh.

(1) [See Note 336.]

"*Grant tout ſon eſtate.*" *Vid. Sect.* 650. Action of waſte, &c. there is implied that he ſhall not enter for a forfeiture, if after the releaſe or grant the leſſee maketh a feoffment in fee.

Sect. 614.

CAR ſi jeo done terre a un home en taile, ſavant le reverſion a moy, et puis le tenant en le taile enfeoffa un auter en fee, le feoffee n'ad pas droiturel eſtate en les tenements pur deux cauſes. Un eſt, pur ceo que per tiel feoffment ma reverſion eſt diſcontinue, le quel eſt a tort fait, et nemy a droit fait. Un auter cauſe eſt, ſi le tenant en taile moruſt, et ſon iſſue ſuiſt briefe de formedon *envers le feoffee, le briefe dirra, et auxy le count, &c. que le feoffee a tort luy deforce, &c. Ergo s'il a tort luy deforce, &c. il n'ad pas droiturel eſtate.*

FOR if I give land to a man in taile, ſaving the reverſion to my ſelfe, and after the tenant in taile enfeoffeth another in fee, the feoffee hath no rightfull eſtate in the tenements for two cauſes. One is, for that by ſuch feoffment my reverſion is diſcontinued, the which is a wrong and not a rightfull act. Another cauſe is, if the tenant in taile dieth, and his iſſue bring a writ of *formedon* againſt the feoffee, the writ and alſo the declaration ſhall ſay, &c. that the feoffee by wrong him deforces, &c. *Ergo* if he deforceth him by wrong, he hath no right eſtate.

HERE *Littleton* proveth, that the feoffee of tenant in taile hath no rightfull eſtate, having reſpect to two perſons; the one is to the donor, whoſe reverſion is diveſted and diſplaced; and the other to the iſſue in taile, who is driven to his action to recover his right. (F. N. B. 211. b.)

[331. b.]

"*A tort luy deforce.*" [n] *Deforciare* is a word of art, and cannot be expreſſed by any other word; for it ſignifieth, to withhold lands or tenements from the right owner; in which caſe either the entrie of the right owner is taken away, or the deforceor holdeth it ſo faſt, as the right owner is driven to his reall *præcipe*, wherein it is ſaid, *unde A. eum injuſtè deforceat*, or the deforceor ſo diſturbeth the right owner, as he cannot enjoy his owne: and therefore it is ſaid, *Per hoc autem quod dicitur in brevi ultimæ præſentationis deforceant, videtur quibuſdam quòd querens innuat per hoc quòd deforceans ſit in ſeiſinâ, ſicut in brevi de rectо, ſed reverâ non eſt ita, ſed ſatis deforceat qui poſſeſſorem uti ſeiſina non permiſerit omninò vel minùs commodè impediat præſentando, appellando, impetrando, ſecundum quod dicitur de diſſeiſitore, ſatisfacit diſſeiſinam, qui uti non permiſit poſſeſſorem vel minùs commodè licèt omninò non expellat.* In this caſe that *Littleton* putteth, the diſcontinuee being in by wrong, is no diſſeiſor, abator, or intrudor, but a deforceor; and hereof commeth Deforcement, and thus did antiquitie deſcribe it: [o] *Deforcement, come ſi aſcun enter en auter tenement tant come le veray ſeignior eſt al market, ou ailors, et retorne, et ne poet aver entre eins eſt celuy deforce et debotue.* And for that at the firſt the withholding was with violence and force, it was called a deforcement of the lands or tenements; but now it is generally extended to all kinde of wrongfull withholding

[n] Bract. li. 4. fol. 238. Flet. lib. 5. cap. 11.

Bract. & Flet. ubi ſupra.

[o] Mir. cap. 2 ſect. 25. (5 Rep. 85. 2 Inſt. 350.)

withholding of lands or tenements from the right owner. There is a writ called a *quòd ei deforceat*, and lieth where tenant in taile, or tenant for life, loſeth by default, by the ſtatute he ſhall have a *quòd ei deforceat* againſt the recoveror, and yet he commeth in by courſe of law (1).

Weſtm. 2. cap. 4.

Sect. 615.

*ITEM, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter en le taile, ſi celuy en le remainder voile graunter ſon remainder a un auter en fee per ſon fait, et le tenant a terme de vie attorna, ceo n'eſt pas diſcontinuance de le remainder *.*

ALSO, if land bee let to a man for terme of his life, the remainder to another in taile, if he in the remainder will grant his remainder to another in fee by his deed, and the tenaunt for life attorne, this is no diſcontinuance of the remainder.

Sect. 616. [332. a.]

ITEM, ſi home ad rent ſervice ou rent charge en taile, et il graunta le dit rent a un auter en fee, et le tenaunt attorna, † ceo n'eſt pas diſcontinuance, &c.

ALSO, if a man hath a rent ſervice or rent charge in taile, and hee grant the ſayd rent to another in fee, and the tenaunt attorne, this is no diſcontinuance, &c.

Sect. 617.

ITEM, ſi home ſoit tenant en taile de un advowſon en groſſe, ou, de un common en groſſe, s'il per ſon fait voile graunt l'advowſon ou le common a un auter en fee, ceo n'eſt pas diſcontinuance; car en tielx caſes les grantees n'ont eſtate forſque pur terme de vie de le tenant en taile que fiſt le grant, &c.

ALSO, if a man bee tenaunt in taile of an advowſon in groſſe, or of a common in groſſe, if he by his deed will graunt the advowſon or common to another in fee, this is no diſcontinuance; for in ſuch caſes the grauntees have no eſtate but for terme of the life of tenant in taile that made the grant, &c.

Bract. l. 2. f. 3. & f. 366. 378. Brit. f. 187. Mir. ca. 2. ſect. 17. Flet. lib. 3. ca. 15. (Poſt. 335.)

BY the caſes in theſe three Sections it appeareth, that if a remainder or a rent ſervice, or a rent charge, or an advowſon, or a common, or any other inheritance that lieth in grant, be granted by tenant in taile, it is no diſcontinuance, as formerly hath beene ſaid.

[p] 5 E. 3. 58. 21 E. 3. 37, 38. 43 E. 3. 1. b. 11 H. 6. 4. 5 H. 7. 37. 18 H. 8. 16 El. Dy. 323. b.

[p] Note, here is an advowſon named by *Littleton*, as a thing that lieth in grant, and paſſeth not by liverie of ſeiſin.

* &c. added L. and M. and Roh. † &c. added L. and M. and Roh.

(1) [See Note 335*.]

Sect. 618.

ET nota, que de tiels choſes que paſſont per voy de graunt, per fait fait en pays, † et ſans livery, la tiel graunt ne fait pas diſcontinuance, come en les caſes avantdits, ‡ et en auter caſes ſemblables, &c. ‖ Et coment que tiels choſes ſont graunts en fee, per fine levie en le court le roy, &c. uncore ceo ne fait diſcontinuance, &c.

AND note, that of ſuch things as paſſe by way of grant, by deed made in the countrie, and without livery, there ſuch grant maketh no diſcontinuance, as in the caſes aforeſayd, and in other like caſes, &c. And albeit ſuch things bee graunted in fee, by fine levied in the king's court, &c. yet this maketh not a diſcontinuance, &c.

HERE is the generall reaſon yeelded of the precedent caſes and the like; for that it is a maxime in law, that a grant [d] by deed of ſuch things as doe lie in grant, and not in liverie of ſeiſin, doe worke no diſcontinuance (1). But the particular reaſon is, for that of ſuch things the grant of tenant in taile worketh no wrong, either to the iſſue in taile, or to him in reverſion or remainder; for nothing doth paſſe but onely during the life of tenant in taile, which is lawfull, and every diſcontinuance worketh a wrong, as hath beene ſaid.

[d] 6 E. 3. 56. 32 E. 3. Diſcont. 3. 33 Aſſ. 8. 4 H. 7. 17. 21 H. 7. 42. 15 H. 7. 19. 21 H. 6. 52, 53. 5 E. 4. 3. 21 E. 4. 5.

22 R. 2. Diſcon. 56. 38 H. 8. Diſcon. 35. Brooke. 19 E. 3. Bre. 468. Pl. Com. 435. 18 Aſſ. p. 2.

[332. b.] [q] If tenant in taile of a rent ſervice, &c. or of a reverſion, or remainder in taile, &c. grant the ſame in fee with warrantie, and leaveth aſſets in fee ſimple, and dieth, this is neither barre nor diſcontinuance to the iſſue in taile; but he may diſtraine for the rent or ſervice, or enter into the land after the deceaſe of tenant for life. But if the iſſue bringeth a formedon in the diſcender, and admit himſelfe out of poſſeſſion, then he ſhall be barred by the warrantie and aſſets.

[q] 33 E. 3. Formed. 47. 13 H. 7. 10. 56 Aſſ. 8. 4 H. 7. 17. (3 Rep. 84, 85. 9 Rep. 51. a.)

[r] Tenant in taile of a rent diſſeiſeth the tenant of the land, and maketh a feoffment in fee with warrantie and dieth, this is no diſcontinuance of the rent, but the iſſue may diſtreyne for the ſame; and albeit the warrantie extend to the rent, yet by the rule of *Littleton* it lieth not in diſcontinuance: and where the thing doth lie in liverie, as lands and tenements, yet if to the conveyance of the freehold or inheritance no liverie of ſeiſin is requiſite, it worketh no diſcontinuance. [s] As if tenant in taile exchange lands, &c. or if the king being tenant in taile, grant by his letters patents the lands in fee, there is no diſcontinuance wrought.

[r] 3 H. 7. 12. (Mo. 634.) 9 E. 4. 22. (1 Roll. Abr. 632. Sir Edward Seymour's caſe. 10 Rep. 95.)

[s] 38 H. 8. Paten. Br. 101. Pl. Com. 233. Li. 1. f. 26. Alton Wood's caſe. (Ant. 251. b.) 48 E. 3. 23. (2 Sid. 65.)

"*Per fine.*" Of a thing that lieth in grant, though it be granted by fine, yet it worketh no diſcontinuance; and this is regularly true.

If

† *et ſans livery, la—&c. lou*, L. and M. and Roh.

‡ *et en—eu*, L. and M. and Roh.

‖ *Et* not in L. and M. nor Roh.

(1) [See Note 287.]

[ſ] If tenant in taile make a leaſe for yeares of lands, and after levie a fine, this is a diſcontinuance; for a fine is a feoffment of record, and the freehold paſſeth. But if tenant in taile maketh a leaſe for his owne life, and after levie a fine, this is no diſcontinuance; becauſe the reverſion expectant upon a ſtate of freehold which lieth onely in grant paſſeth thereby (1).

[ſ] 15 E. 4. tit. Diſcont. 30. 6 H. 56, 57. (1 Rep. 76. 1 Roll. Rep. 168. 1 Sid. 83.)

Sect. 619.

[†*NOTA, ſi jeo done terre a un auter en taile, et il leſſa meſme la terre a un auter pur terme d'ans, et puis le leſſor graunta le reverſion a un auter en fee, et le tenant a terme d'ans atturna al grantee, *et le terme eſt expire durant la vie le tenant en taile, per que le grantee enter, et puis le tenant en taile ad iſſue et devie; en ceo caſe ceo n'eſt diſcontinuance, nient obſtant que le grant ſoit execute en la vie le tenaunt en taile, pur ceo que al temps de leaſe fait a terme d'ans, nul novel fee ſimple fuit reſerve en le leſſor, eins le reverſion demurt a luy en tayle, ſicome il fuit devant le leaſe fait.*]

NOTE, if I give land to another in taile, and hee letteth the ſame land to another for terme of yeares, and after the leſſor graunteth the reverſion to another in fee, and the tenant for yeares attorne to the grantee, and the terme expireth during the life of the tenant in tayle, by which the grauntee enter, and after the tenant in taile hath iſſue and die; in this caſe this is no diſcontinuance, notwithſtanding the grant be executed in the life of the tenant in taile, for that at the time of the leaſe made for yeares, no new fee ſimple was reſerved in the leſſor, but the reverſion remained to him in taile, as it was before the leaſe made.

*THIS is added to *Littleton*, and not in the originall, and therefore I purpoſely omit it: yet is the caſe good in law, becauſe neither the leaſe for yeares, nor the grant of the reverſion, diveſteth any eſtate.

Sect. 620.

[333. a.]

†*MES ſi le tenant en taile fait leas a terme de vie le leſſee, &c. en ceſt caſe le tenant en le tayle ad ‡fait un novel reverſion de ‖fee ſimple en luy; pur ceo que quant il fiſt leas pur terme de vie, &c. il diſcontinua*

BUT if the tenant in taile make a leaſe for terme of the life of the leſſee, &c. in this caſe the tenant in tayle hath made a new reverſion of the fee ſimple in him; becauſe when hee made the leaſe for life, &c. he diſcontinued

† *Nota—item*, L. and M. and Roh. No part of theſe Sections within crotchets is in L. and M. and Roh.

‡ In L. and M. and MSS. this Section begins thus: *Si jeo done terre a un auter en le tail, et il leſſa meſme la terre a un auter pur terme de vie, &c.*

‡ *un* added L. and M.

‖ *de—en*, L. and M.

(1) [See Note 288.]

tinua le taile ‡, *&c. per force de meſme le leas, et auxy il diſcontinua ma reverſion, &c. Et il covient que la reverſion de fee ſimple ſoit en aſcun perſon en tiel cas: et il ne poit eſtre en moy que ſue donor, entant que mon reverſion eſt diſcontinue*; ergo *il covient que la reverſion de fee ſoit en le tenant en le taile, que diſcontinua ma reverſion per tiel leas, &c. Et ſi en ceſt caſe le tenant en le taile grauntz per ſon fait ceſt reverſion en fee a un auter, et le tenant a terme de vie atturna, &c. et puis le tenant a terme de vie moruſt, vivant le tenant en le taile, et le grantee de le reverſion entra, &c. en la vie le tenant en le taile, donques ceo eſt un diſcontinuance en fee*; *et ſi apres le tenant en le taile moruſt, ſon iſſue ne poit enter, mes eſt mis a ſon briefe de* formedon. *Et la cauſe eſt, pur ceo que ceſtuy que avoit le grant de tiel reverſion en fee ſimple, avoit le ſeiſin et execution de meſmes les terres ou tenements, d'aver a luy et a ſes heires en ſon demeſne come de fee, en la vie le tenant en taile.* * [*Et ceo eſt per force de grant de meſme le tenant en taile.*

diſcontinued the tayle, &c. by force of the ſame leaſe, and alſo hee diſcontinued my reverſion, &c. And it behoveth that the reverſion of the fee ſimple be in ſome perſon in ſuch caſe: and it cannot be in me which am the donor, inaſmuch as my reverſion is diſcontinued; *ergo* the reverſion of the fee ought to be in the tenant in tayle, who diſcontinued my reverſion by leaſe, &c. And if in this caſe the tenant in tayle grant by his deed this reverſion in fee to another, and the tenant for life attorne, &c. and after the tenant for life dieth, living the tenant in taile, and the grantee of the reverſion enter, &c. in the life of the tenant in taile, then this is a diſcontinuance in fee; and if after the tenant in tayle dieth, his iſſue may not enter, but is put to his writ of *formedon*. And the cauſe is, for that he which hath the grant of ſuch reverſion in fee ſimple, hath the ſeiſin and execution of the ſame lands or tenements, to have to him and to his heires in his demeſne as of fee, in the life of the tenant in taile. And this is by force of the grant of the ſaid tenant in tayle.

"PUR *terme de vie del leſſee, &c.*" Here is implied, or for terme of another man's life (1). (1 Roll. 638.)

"*Novel reverſion de fee ſimple.*" Which muſt bee underſtood of a fee ſimple determinable upon the life of the leſſee, which our author here calleth a fee ſimple; for if the leſſee dieth the donee is tenant in taile againe, as hee was before: and that is the reaſon that if in that caſe hee granteth over the reverſion and dieth; and after the death of tenant in taile the leſſee dieth; the entry of the iſſue is lawfull, becauſe by the death of the leſſee the diſcontinuance is determined; and conſequently the grant made of the reverſion gained upon that diſcontinuance is void alſo. 15 E. 4. tit. Diſcont. 30. (Cro. Car. 156.)

If tenant in taile maketh a leaſe for three lives according to the ſtatute of 32 *H.* 8. that is no diſcontinuance of the eſtate taile or of the reverſion, becauſe it is authoriſed by act of parliament, whereunto every man in judgement of law is partie. 32 H. 8. cap. 28.

And

‡ *le taile, &c. per force de meſme le leas, et auxy il diſcontinua*, not in L. and M. nor Roh.

* No part of this or of the following Section within crotchets is in L. and M. and Roh.

(1) [See Note 289.]

And yet in ſome caſes the freehold may be diſcontinued and not the reverſion. [u] As if the huſband and wife make a leaſe for life by deed (2) of the wife's land, reſerving a rent, the huſband dieth; this was a diſcontinuance at the common law for life; and yet the reverſion was not diſcontinued, but remained in the wife. Otherwiſe it is if the huſband had made the leaſe alone. [333. b.]

[u] 38 E. 3. 32. 18 Aſſ. 2. 18 E. 3. 54. 22 H. 6. 34. (8 Rep. 71.)

"Et puis le tenant a terme de vie moruſt, &c." The like law it is if the tenant for life ſurrender to the grantee, or if the grantee recover in an action of waſte, or enter for the forfeiture.

21 H. 6. 52. 15 E. 4. tit. Diſcont. 30.

"Avoit ſeiſin et execution." And here it is to be obſerved, that when the reverſion in this caſe is executed in the life of tenant in taile, it is equivalent in judgement of law to a feoffment in fee, for the ſtate for life paſſed by livery.

32 E. 3. Diſcont. 2. 43 E. 3. Entr. Cong. 31. 3 H. 4. 9.

22 R. 2. Diſcont. 50. 34 Aſſ. 6. Pl. 4. 38 Aſſ. 6. p. 6. 43 Aſſ. 6. 48. 18 E. 3. 43. 21 H. 6. 52. 15 E. 4. tit. Diſcontinuance 30. Brooke tit. Diſcont. 3. & 14. 4 H. 7. 17. 21 H. 7. 11.

[w] If tenant in taile make a leaſe for life, the remainder in fee, this is an abſolute diſcontinuance, albeit the remainder be not executed in the life of tenant in taile, becauſe all is one eſtate, and paſſeth by one livery. And ſo note a diverſitie betweene a grant of a reverſion, and a limitation of a remainder. *B.* tenant in taile maketh a gift in taile to *A.* and after *B.* releaſeth to *A.* and his heires, and after *A.* dieth without iſſue; the iſſue of the firſt donee may enter upon the collaterall heire, becauſe *A.* had not ſeiſin and execution of the reverſion of the land in his demeſne as of fee, as *Littleton* here ſpeaketh. But if tenant in taile make a leaſe for the life of the leſſee, and after releaſeth to him and his heires, this is an abſolute diſcontinuance; becauſe the fee ſimple is executed in the life of tenant in taile.

[w] 21 H. 6. 52, 53.

[y] If tenant in taile of a mannor whereunto an advowſon is appendant, maketh a feoffment in fee by deed (as it ought to be) of one acre with the advowſon, and the church becommeth void, and the feoffee preſent, tenant in taile dieth, the church becommeth void; the iſſue ſhall not preſent untill he hath re-continued the acre. But if the feoffee had not executed the ſame by preſentment, then the iſſue in taile ſhould have preſented. And ſo was it at the common law, of the huſband ſeiſed in the right of his wife, *mutatis mutandis.*

[y] 34 E. 1. quare impedit 179. 22 E. 3. 6. 17 E. 3. 3. 33 E. 3. quare imp. 196. 23 Aſſ. 8. 50 E. 3. 26. (Ant. 298. Poſt. 349. b. F. N. B. 32. 1 Roll. Abr. 632. 1 Rep. 76.)

If a fine be levied to a tenant in taile, and he granteth and rendreth the land to him and his heires, and die before execution, this is no diſcontinuance. Otherwiſe it is, if it had beene executed in the life of tenant in taile.

36 Aſſ. 8. 42 E. 3. 20. 22 R. 2. Diſcont. 50. (Sect. 601. 638.)

If tenant in taile make a leaſe for life of the leſſee, and after grant the reverſion with warrantie, and dieth before execution, this is no diſcontinuance; becauſe the diſcontinuance was (as hath beene ſaid) but for life, and the warrantie cannot enlarge the ſame (1).

21 H. 6. 52, 53. Brooke tit. Diſcont. 3. 21 H. 7. 11. Lib. 1. fol. 85. Lib. 10. fol. 96, 97. (W. Jones 219. Cro. Car. 156.)

"Et ceo eſt per force del grant de meſme le tenant en tayle." Hereupon *Littleton* himſelfe is of the ſame opinion, (*) as it appeareth he

(*) 15 E. 4. Diſcont. 30. Vide Sect. 642.

(2) [See Note 290.] (1) [See Note 291.]

he was in our bookes; that if tenant in taile make a leaſe for life, and grant the reverſion in fee, and the leſſee attorne, and that grantee granteth it over, and the leſſee attorne, and then the leſſee for life dieth, ſo as the reverſion is executed in the life of tenant in taile, yet this is no diſcontinuance, but that after the death of tenant in taile the iſſue may enter; becauſe (as *Littleton* here ſaith) he is not in of the grant of the tenant in taile, but of his grantee.

If at this day tenant in taile make a leaſe for life, and after by deed indented and inrolled according to the ſtatute he bargaineth and ſelleth the reverſion to another in fee, and the leſſee dieth, ſo as the reverſion is executed in the life of tenant in taile; albeit the bargainee is not in the *per* by the tenant in taile, yet inaſmuch as he claimeth the reverſion immediately from him, which is executed in his lifetime, this is a diſcontinuance. And ſo it is, and for the ſame cauſe, if tenant in taile had granted the reverſion to the uſe of another and his heires. If tenant in taile maketh a leaſe for life, and after diſſeiſeth the leſſee for life, and maketh a feoffment in fee, the leſſee dieth, and then tenant in taile dieth; albeit the fee be executed, yet for that the fee was not executed by lawfull meanes, (as in all the caſes of *Littleton* it appeareth it ought to be) it is no diſcontinuance.

[334. a.]

Sect. 621.

(Poſt. 335. b. meſme le caſe.)

EN meſme le manner ſerra, ſi en le caſe avantdit le tenant a terme de vie apres l'attournement al grantee uſt alien en fee, et le grantee uſt enter pur forfeiture de ſon eſtate, et puis le tenant en taile uſt devie, c'eſt un diſcontinuance, cauſâ quâ ſupra.]

IN the ſame manner ſhall it be, if in the caſe aforeſaid the tenant for terme of life after the attornement to the grantee had aliened in fee, and the grantee had entred by forfeiture of his eſtate, and after the tenant in tayle had died, this is a diſcontinuance, *cauſâ quâ ſupra.*

THIS is added in this place, but in the originall it commeth in after in this Chapter *.

21 H. 6. 52, 53. 15 E. 4. Diſcont. 30.

Sect. 622.

(Sir W. Jones 209. Cro. Car. 156.)

MES en ceſt cas, ſi tenant en taile que granta le reverſion, &c. moruſt, vivant le tenant a terme de vie, et puis le tenant a terme de vie moruſt, et puis celuy a que le reverſion fuit graunt enter, &c. donque ceo n'eſt pas diſcontinuance, mes que l'iſſue del tenant

BUT in this caſe, if tenant in taile that grants the reverſion, &c. dieth, living the tenant for life, and after the tenant for life dieth, and after hee to whom the reverſion was granted enter, &c. then this is no diſcontinuance, but that the iſſue of the

* But it does not appear in this Chapter in L. and M. nor Roh. nor in MSS.

tenant en taile poit bien enter ſur le grauntee del reverſion; pur ceo que le reverſion que le grauntee avoit, &c. ne fuit execute, &c. eu le vie le tenant en taile, &c. Et iſſint il eſt graund diverſity quant tenant en taile fait un leas pur terme d'ans, et lou il fait leas pur terme de vie; car en l'un cas il ad reverſion en taile, et en l'auter cas il ad un reverſion en fee.

the tenant in tayle may well enter upon the grantee of the reverſion; becauſe the reverſion which the grantee had, &c. was not executed, &c. in the life of the tenant in taile, &c. And ſo there is a great diverſitie when tenant in tayle maketh a leaſe for yeares, and where he maketh a leaſe for life; for in the one caſe hee hath a reverſion in tayle, and in the other caſe hee hath a reverſion in fee (1).

OF this ſufficient hath beene ſaid before, and is of itſelfe manifeſt, and needeth no explication.

18 Aſſ. 6. 21 H. 6. 53. Like law was at the common law of a huſband ſeiſed of land in right of his wife, *mutatis mutandis*.

Sect. 623. [334. b.]

*CAR ſi terre ſoit done a un home et a ſes heires males de ſon corps engendres, le quel ad iſſue deux fits, et l'eigné fits ad iſſue file et devy, * et le tenant en taile fait un leas pur terme des ans et devy, ore le reverſion diſcendiſt a le fits puiſne, pur ceo que le reverſion fuit forſque en le taile, et le fits puiſne eſt heire male, &c. Mes ſi le tenant uſt fait un leas pur terme de vie, &c. et puis moruſt, ore le reverſion diſcendiſt a le file del eigne fits, pur ceo que le reverſion eſt en fee ſimple, et la file eſt heire general, &c.*

FOR if land bee given to a man and to his heires males of his body engendred, who hath iſſue two ſonnes, and the eldeſt ſonne hath iſſue a daughter and dieth, and the tenant in tayle maketh a leaſe for yeares and die, now the reverſion deſcendeth to the younger ſonne, for that the reverſion was but in the taile, and the youngeſt ſonne is heire male, &c. But if the tenant had made a leaſe for life, &c. and after died, now the reverſion deſcendeth to the daughter of the elder brother, for that the reverſion is in the fee ſimple, and the daughter is heire generall, &c. (1)

This is evident alſo, and needeth no explanation.

Sect. 624.

ITEM, ſi home ſoit ſeiſie en taile de terres deviſables per teſtament, &c. et il ceo deviſa a un auter en fee, et moruſt, et l'auter enter, &c. ceo n'eſt pas diſcontinuance, pur ceo que nul

ALSO, if a man be ſeiſed in taile of lands deviſable by teſtament, &c. and hee deviſeth this to another in fee, and dieth, and the other enter, &c. this is no diſcontinuance, for

* *et le tenant en taile fait un leas pur terme des ans, et devy,* not in L. and M. nor Roh.

(1) See the note on the following Section. [334. b.]

(1) [See Note 292.]

nul diſcontinuance fuit fait en la vie del tenant en le taile, &c.

for that no diſcontinuance was made in the life of the tenant in taile, &c.

THIS is manifeſt, and needeth no explanation: only this is to be obſerved, that no diſcontinuance can be made by tenant in taile, but ſuch as is made and taketh effect in his life-time, which is here implied in the (*&c.*) 9 E. 4. 22. 28 H. 6. 14. Vid. 18 E. 3. 8. (Cro. Car. 405. 1 Roll. Abr. 633.)

Sect. 625.

ITEM, ſi terre ſoit doue en taile, ſavant le reverſion al donor, et puis le tenant en taile per ſon fait enfeoffa le donor, a aver et tener a luy et a ſes heires a touts jours, et liver a luy ſeiſin accordant, &c. ceo n'eſt pas diſcontinuance, pur ceo que nul poit diſcontinuer l'eſtate en le taile, ſinon que il diſcontinue le reverſion celuy que ad le reverſion, &c. ou le remainder, ſi aſcun ad le remainder, &c. Et entant que per tiel feoffment fait a le donor (le reverſion adonques eſteant en luy) ſon reverſion ne fuit diſcontinue ne alterate, &c. ceſt feoffment n'eſt pas diſcontinuance, &c.

ALSO, if land be given in taile, ſaving the reverſion to the donor, and after the tenant in taile by his deed enfeoffe the donor, to have and to hold to him and to his heires for ever, and deliver to him ſeiſin accordingly, &c. this is no diſcontinuance, becauſe none can diſcontinue the eſtate taile, unleſſe he diſcontinueth the reverſion of him who hath the reverſion, &c. or remainder, if any hath the remainder, &c. And inaſmuch as by ſuch feoffment made to the donor (the reverſion then being in him) his reverſion was not diſcontinued nor altred, &c. this feoffment is no diſcontinuance, &c.

AND of this opinion is *Littleton* [*a*] in our bookes, and ſaith that ſo it was adjudged. [*a*] 9 E. 4. 24. b.

"*Enfeoffee le donor, &c.*" This muſt be underſtood where the reverſion of the donor is immediately expectant upon the eſtate of the donee; [*b*] for if a man make a gift in taile the remainder in taile, reſerving the reverſion to himſelfe: in this caſe if the donee enfeoffe the donor, this is a diſcontinuance, becauſe there is a meane eſtate; and ſo doth *Littleton* here put his caſe of a reverſion immediately expectant upon the gift in taile. Alſo it is to be intended of a feoffment made to the donor ſolely or only; for if the donee enfeoffe the donor and a ſtranger, this is a diſcontinuance of the whole land. Lib. 1. fol. 140. in Chudlye's caſe. (1 Roll. Abr. 634.) [*b*] 41 Aſſ. 2. 41 E. 3. 2. (1 Rep. 146. b.) (Ant. 48. a.) 28 H. 8. Diſc. 12.

[335. a.]

But if tenant for life make a leaſe for his owne life to the leſſor, the remainder to the leſſor and an eſtranger in fee; in this caſe, foraſmuch as the limitation of the fee ſhould worke the wrong, it enureth to the leſſor as a ſurrender for the one moytie, and a forfeiture as to the remainder of the ſtranger; for he cannot give to the leſſor that which he had before, as our author here ſaith; and as to the remainder to the ſtranger, it is a forfeiture for his moytie, and when the leſſor entreth, he ſhall take the benefit of it. But if two joyntenants be, and one of them enfeoffe his companion and a ſtranger, (1 Rep. 76. b. Sid. 361.) (Dyer 12. b.) (Ant. 169. a. 186. a. 193. b. 200. b. 2 Roll.

Abr. 86. 403. 1 Rep. 100. b. 4 Leo. 23.)

a ſtranger, and make livery to the ſtranger; this ſhall veſt only in the ſtranger, becauſe the livery cannot enure to his companion.

40 Aſſ. 36. 21 Aſſ. 36. 18 E. 3. 45. F. N. B. 142. a. Pl. Com. 555.

"*Nul poit diſcontinuer l'eſtate en taile, ſinan que il diſcontinue le reverſion, &c. ou le remainder, &c.*" And therefore for this cauſe, if the reverſion or remainder be in the king, the tenant in taile cannot diſcontinue the eſtate taile [*c*]. But tenant in taile, the reverſion in the king, might have barred the eſtate taile by a common recovery, untill the ſtatute of 34 *H.* 8. *ca.* 20. which reſtraineth ſuch a tenant in taile; but that common recovery neither barred nor diſcontinued the king's reverſion (1).

[*c*] 33 H. 8. tit. Taile Br. 41. Pl. Com. ubi ſupra.

Note, the reverſion may be reveſted, and yet the diſcontinuance remaine. [*d*] As if a feme covert be tenant for life, and the huſband make a feoffment in fee, and the leſſor enter for the forfeiture; here is the reverſion reveſted, and yet the diſcontinuance remained at the common law.

[*d*] 37 Aſſ. p. 60. 39 Aſſ. 43. 11 Aſſ. 11. 16 Aſſ. 11. 18 E. 3. 45. (Ant. 333. b. Poſt. 336.)

(1 Roll. Abr. 633.)

Sect. 626.

EN meſme le maner eſt, lou terres ſont dones a un home en taile, le remainder a un auter en fee, et le tenant en taile enfeoffa celuy que eſt en le remainder, a aver et tener a luy et a ſes heires; ceo n'eſt pas diſcontinuance, cauſâ quâ ſuprâ.

IN the ſame manner is it, where lands are given to a man in taile, the remainder to another in fee, and the tenant in taile enfeoffe him that is in the remainder, to have and to hold to him and to his heires; this is no diſcontinuance, *cauſâ quâ ſuprà* (2).

"*LE remainder a un auter.*" Here it appeareth that (as hath beene ſaid in caſe of a reverſion) the remainder muſt be immediately expectant upon the eſtate taile.

Sect. 627. [335. b.]

*ITEM, ſi un abbe ad un reverſion, ou rent ſervice, ou rent charge, et voile graunter * cel reverſion, ou rent ſervice, ou rent charge, a un auter en fee, et le tenant atturna, &c. ceo n'eſt pas diſcontinuance.*

ALSO, if an abbot hath a reverſion, or a rent ſervice, or a rent charge, and he will grant this reverſion, or rent ſervice, or rent charge, to another in fee, and the tenant atorne, &c. this is no diſcontinuance.

Of inheritances that lie in grant, ſufficient hath beene ſaid before.

* *cel reverſion, ou rent ſervice, ou rent charge—un d'eux,* L. and M. and Roh. but as above in MSS.

(1) See Stone v. Newman, 2 Cro. 427. (2) [See Note 293.]

Sect. 628.

EN meſme le manner lou abbe eſt ſeiſie d'un advowſon, ou de tielx choſes que paſſont per voy d'un grant ſans liverie de ſeiſin, &c.

IN the ſame manner where an abbot is ſeiſed of an advowſon, or of ſuch things which paſſe by way of grant without liverie of ſeiſin, &c.

HERE it appeareth, (as hath beene ſaid) that an advowſon doth not lie in liverie, but in grant.

Sect. 629.

(Ant. 234. a.)

ITEM, ſi tenant en taile leſſa ſa terre a un auter pur terme de vie, et puis il graunta en fee le reverſion a un auter, et le tenant atturna, et puis le tenant a terme de vie aliena en fee, et le grantee de reverſion entra, &c. en le vie le tenant en le taile, et puis le tenant en le taile moruſt, ſon iſſue ne poit enter, mes eſt mis a ſon briefe de formedon, *pur ceo que le reverſion en fee ſimple que le grauntor avoit per le grant del tenant en le taile, fuit executе en le vie de meſme le tenaunt en le taile, et pur ceo eſt un diſcontinuance en fee, &c.*

ALSO, if tenant in tayle letteth his land to another for life, and after he granteth in fee the reverſion to another, and the tenant attorne, and after the tenant for life alien in fee, and the grauntee of the reverſion enter, &c., in the life of the tenant in taile, and after the tenant in taile dieth, his iſſue ſhall not enter, but is put to his writ of *formedon*, becauſe the reverſion in fee ſimple which the grauntor had by the graunt of the tenant in tayle, was executed in the life of the ſame tenant in tayle, and therefore it is a diſcontinuance in fee, &c.

Of this ſufficient hath beene ſaid before.

[336. a.]

Sect. 630.

(1 Roll. Abr. 631.)

ET nota, que aſcuns font diſcontinuances pur terme de vie. Sicome tenaunt en le taile fait un leaſe pur terme de vie, ſavant le reverſion a luy auxy longement que le reverſion eſt al tenant en taile, ou a ſes heires; ceo n'eſt diſcontinuance, forſque durant la vie le tenant a terme de vie, &c. Et ſi tiel tenant en taile dona les tenements a un auter en taile, ſavant le reverſion, donques ceo eſt diſcontinuance durant le ſecond taile, &c.

AND note, that ſome make diſcontinuances for terme of life. As if tenant in tayle make a leaſe for life, ſaving the reverſion to him as long as the reverſion is to the tenaunt in tayle, or to his heyres; this is no diſcontinuance but during the life of tenant for life, &c. And if ſuch tenant in taile giveth the lands to another in tayle, ſaving the reverſion, then this is a diſcontinuance during the ſecond tayle, &c.

THIS

THIS is manifeſt, and hath beene handled before, and needeth no explanation; onely this is to be obſerved, where *Littleton* putteth hereafter caſes of diſcontinuances by feoffement, &c. he hath a double entendment. Firſt, by feoffement, or by any other conveyance which may make a diſcontinuance. Secondly, (&c.) implieth a diſcontinuance by a gift in taile, or a leaſe for life, &c.

Sect. 631.

MES ſou le tenant en tayle fait un leaſe pur terme d'ans, ou pur terme de vie, le remainder a un auter en fee, et delivera liverie de ſeiſin accordant, ceo eſt diſcontinuance en fee, pur ceo que le fee ſimple paſſa per force de liverie de ſeiſin, &c.

BUT where the tenant in tayle maketh a leaſe for yeares or for life, the remainder to another in fee, and delivereth liverie of ſeiſin accordingly, this is a diſcontinuance in fee, for that the fee ſimple paſſeth by force of the liverie of ſeiſin, &c.

This is evident alſo, and hereof ſufficient hath beene ſpoken before.

Sect. 632

ET eſt aſcavoir, que aſcuns tiels diſcontinuances ſont fait ſur condition, &c. et pur ceo que les conditions ſont enfreints, &c. ou pur auters cauſes, ſolonque le courſe de la ley, tiels eſtates ſont defeates, donques ſont les diſcontinuances defeats, et ne tollent aſcun home per force de eux de ſon entrie, &c. * *Come ſi le baron ſoit ſeiſie de certaine terre en droit ſa feme, et fait feoffement en fee ſur condition, et devie, ſi le heire apres enter ſur le feoffee pur le condition enfreint, l'entrie la feme eſt congeable ſur le heire, pur ceo que per l'entrie del heire le diſcontinuance eſt defeat, come eſt adjudge.*

AND it is to be underſtood, that ſome ſuch diſcontinuances are made upon condition, &c. and for that the conditions be broken, &c. or for other cauſes, according to the courſe of law, ſuch eſtates are defeated, then are the diſcontinuances defeated, and ſhall not by force of them take any man from his entrie, &c. As if the huſband be ſeiſed of certaine land in right of his wife, and maketh a feoffement in fee upon condition, and dyeth, if the heire after enter upon the feoffee for the condition broken, the entrie of the wife was congeable upon the heire, for that by the entry of the heire the diſcontinuance is defeated, as is adjudged.

"*DISCONTINUANCES fait ſur condition, &c.*" Here is to be underſtood a diverſitie betweene a condition in deed, whereof *Littleton* here ſpeaketh, and a condition in law, whereof
(Ant. 335. a.) ſomewhat hath beene ſaid before in this chapter, vis. where the feme is tenant for life, and the huſband maketh a feoffement in fee, and the leſſor entreth for the condition in law. [336. b.]

"*Conditions*

* The remaining part of the above Section is not in L. and M. nor Roh. nor in Pynſon, nor MSS. But in all, the caſe of the grandfather, father, and ſon, Sect. 637, is here inſerted, with ſome ſmall variation.

"*Conditions ſont enfreints, &c.*" Here is implied, or any caſe given either by diſabilitie of the feoffees, or by any condition performed on the part of the feoffor, or otherwiſe, whereby the ſtate is in any ſort avoided.

"*Come ſi le baron ſoit ſeiſie de certaine terre en droit ſa feme, &c.*" Here it appeareth, that for the condition broken, the heire of the huſband may enter; for albeit no right deſcend from the huſband to his heire, yet the title of entry by force of the condition which the huſband created upon the feoffement, and reſerved to him and his heires, doth deſcend to his heire; and *Littleton* ſaith truly, that ſo it hath beene adjudged. (2 Rep. 59.) 4 H. 6. 2. 9 H. 7. 24. b. Lib. 8. fol. 43, 44. Whittingham's caſe. (Ant. 12. b. 46. b. 202. a.)

"*Sur le heire.*" *Nota*, when the heire in this caſe hath entred for the condition broken, and hath avoided the feoffement, the eſtate of the heire vaniſheth away, and preſently the eſtate veſteth in the feme or her heires, without any entry or claime by her or them; for the heire entreth in reſpect of the condition, upon the reall contract, and not of any right, as hath beene ſaid; and if the huſband himſelfe had re-entred, the ſtate had veſted in his wife: and therefore where *Littleton* and our bookes ſay, that the wife ſhall enter upon the heire, the meaning is, that after the re-entry of the heire ſhe may enter. Whittingham's caſe, ubi ſupra.

Sect. 633.

ITEM, ſi feme inheritrix que ad un baron, quel baron eſt deins age, et il eſteant deins age fait un feoffment de les tenements ſon feme en fee, et moreſt, il ad eſte queſtion, ſi la feme poit enter, ou non, &c. Et il ſemble a aſcuns, que l'entry la feme apres la mort ſa baron, eſt congeable en ceſt cas. Car quant ſa baron feaſoit tiel feoffment, &c. il puiſſoit bien enter, nient contriſteant tiel feoffment, &c. durant la coverture; et il ne puiſſoit enter en ſon droit demeſne, mes en le droit la feme: ergo, *tiel droit que il avoit d'entrer en droit ſa feme, &c. ceſt droit d'entrer demurt al feme apres ſon deceaſe.*

ALSO, if a woman inheritrix hath a huſband who is within age, and hee being within age maketh a feoffement of the tenements of his wife in fee, and dieth, it hath beene a queſtion, if the wife may enter or not, &c. And it ſeemeth to ſome, that the entrie of the wife after the death of her huſband, is congeable in this caſe. For when her huſband made ſuch feoffment, &c. he might well enter, notwithſtanding ſuch feoffment, &c. during the coverture; and he could not enter in his owne right, but in the right of his wife: *ergo*, ſuch right as hee had to enter in the right of his wife, &c. this right of entrie remayneth to the wife after his deceaſe.

THE reaſon here rendred by *Littleton* is, for that the huſband cannot enter in his owne right, but in the right of his wife; and the heire of the huſband cannot enter, for no right or title deſcends unto him, and the wife in this caſe ſhall take benefit of the nonage of her huſband, and enter into the land. Whittingham's caſe, ubi ſupra.

If an infant be tenant for another man's life, and make a feoffement in fee, and *ceſty que vie* dieth, the infant himſelfe ſhal not enter, becauſe he hath no right at all.

If

If the huſband within age take to wife feme tenant in taile generall, and the huſband make a gift in taile and dieth within age, in this caſe the wife may enter, as *Littleton* here holdeth, or the heire of the huſband in reſpect of the new reverſion deſcended unto him may enter. But if the heire enter, preſently thereupon his eſtate vaniſheth. If tenant in taile being within the age of one and twenty yeeres make a feoffment in fee, and after is attainted of felony and dieth, the entry of the iſſue is not lawfull; for his entry is not lawfull in reſpect of his eſtate only, but of his blood alſo which is corrupted; and therefore in that caſe he is driven to his *formedon*. [337. a.]

(8 Rep. 43.) 14 E. 3. Bre. 201. 14 E. 3. Dum fuit infra ætatem 6. F. N. B. 192. (1 Roll. Abr. 634).

If huſband and wife be both within age, and they by deed indented joyne in a feoffment reſerving a rent, the huſband dieth, the wife may enter, or have a *dum fuit infra ætatem*. But if ſhe were of full age, ſhe ſhall not have a *dum fuit infra ætatem*, for the nonage of her huſband, albeit they be but one perſon in law.

Sect. 634.

ET il y ad eſte dit, que ſi deux joyntenants eſteants deins age font un feoffment en fee, et l'un des enfants devy, et l'auter ſurveſquiſt; entant que les ambideux enfants puiſſont enter joyntment en lour vies, cel droit accruiſt tout a luy que ſurveſquiſt, et pur ceo celuy que ſurveſquiſt poit enter en l'entiertie, &c. Et auxy l'heire le baron que fiſt le feoffment deins age ne poit enter, &c. pur ceo que nul droit diſcendiſt a tiel heire en le cas avantdit, pur ceo que le baron n'avoit unques riens forſque en droit de ſa feme, &c.

AND it hath beene ſaid, that if two joyntenants being within age make a feoffement in fee, and one of the infants die, and the other ſurviveth; in as much as both the infants might enter joyntly in their lives, this right accrueth all to him which ſurviveth, and therefore hee that ſurviveth may enter into the whole, &c. And alſo the heire of the huſband which made the feoffment within age cannot enter, &c. becauſe no right deſcendeth to ſuch heire in the caſe aforeſaid, for that the huſband had never any thing but in right of his wife, &c.

21 E. 3. 50. 18 E. 2. Bre. 851. 6 E. 3. 4. 9 H. 6. 6. 19 H. 6. 6. 39 H. 6. 42. 34 H. 6. 31. F. N. B. 192. See of this in the Chapter of Joyntenants. (8 Rep. Whitingham's caſe.)

"*POINT enter en l'entiertie, &c.*" And the reaſon hereof is implied in this (*&c.*) for that they may joyne in a writ of right, and therefore the right ſhall ſurvive. But they cannot joyne in a *dum fuit infra ætatem*, becauſe the nonage of the one is not the nonage of the other. In this caſe, if one joyntenant had made a feoffment in fee and died, the right ſhould not have ſurvived, for the joynture was ſevered for a time. If two joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant ſhall enter, or have a *dum fuit infra ætatem* but for the moitie. [337. b.]

Sect. 635.

(F. N. B. 192. a. 5 Rep. 27. 29. 6 Rep. 3. 9 Rep. 84. b. 8 Rep. 42.)

ET auxy quant un enfant fait un feoffment eſteant deins age, ceo ne luy greevera ne ledra, mes que il poit enter bien, &c. car ceo ſerroit encounter reaſon, que tiel feoffment fait per celuy que ne fuit able de faire tiel feoffment, greevera ou ledera auter, de toller eux de lour entre, &c. Et pur ceux cauſes il ſemble a aſciuns, que apres la mort de tiel baron iſſint eſteant deins age al temps de le feoffment, &c. que ſa feme bien poit enter, &c.

AND alſo when an infant make a feoffment being within age, this ſhall neither grieve nor hurt him, but that hee may well enter, &c. for it ſhould be againſt reaſon that ſuch feoffment made by him that was not able to make ſuch a feoffment ſhall grieve or hurt another, to take them from their entry, &c. And for theſe reaſons it ſeemeth to ſome, that after the death of ſuch huſband ſo being within age at the time of the feoffment, &c. that his wife may well enter, &c.

"*MES que il poit enter bien, &c.*" Here is implied, that he might enter either within age, or at any time after full age, and likewiſe after his death his heire may enter. *Meliorem enim conditionem facere poteſt minor deteriorem nequaquam.* (Bract. fol. 14. Britton fol. 88. a. Fleta lib. 3. cap. 3. (Poſt. 350. b, 380. b.)

Nota, A ſpeciall heire ſhall take advantage of the infancie of the anceſtor. As if tenant in taile of an acre of the cuſtome of borow Engliſh make a feoffment in fee within age, and dieth, the youngeſt ſonne ſhall avoid it; for he is privie in bloud, and claimeth by diſcent from the infant.

And ſo if tenant in taile to him and the heires females of his bodie make a feoffment in fee and dieth within age, having iſſue a ſonne and a daughter, the daughter ſhall avoid the feoffment. And ſo note, that a cauſe to enter by reaſon of infancie is not like to conditions, warranties, and eſtoppels, which ever deſcend to the heire at the common law. (8 Rep. 54. Ant. 12. a.)

The reſidue of this Section upon that which hath beene ſaid is evident.

Sect. 636.

ITEM, ſi feme inheritrix prent baron, et ont iſſue fits, et le baron moruſt, et el prent auter baron, et le ſecond baron leſſa la terre que il ad en droit ſa feme a un auter pur terme de ſa vie, et puis la feme moruſt, et puis le tenant a terme de vie ſurrendiſt ſon eſtate a le ſecond baron, &c. quære, *ſi le fits le feme poit enter en ceſt cas ſur*

ALSO, if a woman inheritrix taketh huſband, and they have iſſue a ſonne, and the huſband dieth, and ſhe takes another huſband, and the ſecond huſband letteth the land which he hath in right of his wife to another for terme of his life, and after the wife dieth, and after the tenant for life ſurrendereth his eſtate to

*ſur le ſecond baron durant la vie le tenant a terme de vie, * &c. Mes il eſt cleere ley, que apres la mort le tenant a terme de vie, le fits la feme poit enter; pur ceo que le diſcontinuance, que fuit tantſolement pur terme de vie, eſt determine, &c. per la mort de meſme le tenant a terme de vie* †.

to the ſecond huſband, &c. *quære*, if the ſonne of the wife may enter in this caſe upon the ſecond huſband during the life of tenant for life, &c. But it is cleere law, that after the death of the tenant for life, the ſon of the wife may enter; becauſe the diſcontinuance, which was only for terme of life, is determined, &c. by the death of the ſame tenant for life.

(Ante 218. b. Pask. 561. 2 Roll. Abr. 494.)

"SURRENDER," *ſurſum redditio*, properly is a yeelding up an eſtate for life or yeares to him that hath an immediate eſtate in reverſion or remainder, wherein the eſtate for life or yeares may drowne by mutuall agreement betweene them (1).

(Ant. 218. b.)

Note, there be three kinde of ſurrenders, viz. a ſurrender properly taken at the common law, which is here before deſcribed, and whereof *Littleton* ſpeaketh (1). Secondly, a ſurrender by cuſtome of lands holden by copy, or of cuſtomary eſtates, whereof you have read before, *Sect.* 74. and a ſurrender improperly taken (as appeare before, *Sect.* 550.) of a deed. And ſo of a ſurrender of a patent, and of a rent newly created, and of a fee ſimple to the king. [338. a.]

(9 Rep. 75.) 2 Eliz. Dier 176. 14 H. 7. 3. 27 Aſſ. 37. 49 E. 3. 2. 11 H. 4. 2. 13 H. 4. 21. 13 H. 4. 13.

14 H. 8. 15. 37 H. 6. 17. 21 H. 7. 6. 40 E. 3. 24. 31 Aſſ. 26. 50 E. 3. 6. 44 Aſſ. 3. 35 H. 8. Dier 37. 8 Aſſ. 29. 4 Ma. Dier 141. 11 Eliz. Dier 280. 6 H. 7. 9. 37 H. 6. 17. 21 H. 7. 6.

A ſurrender properly taken is of two ſorts, viz. a ſurrender in deed, or by expreſſe words, (whereof *Littleton* here putteth an example) and a ſurrender in law wrought by conſequent by operation of law. *Littleton* here putteth his caſe of a ſurrender of an eſtate in poſſeſſion, for a right cannot bee ſurrendered. And it is to be noted, that a ſurrender in law is in ſome caſes of greater force than a ſurrender in deed. As if a man make a leaſe for yeares to begin at *Michaelmaſſe* next, this future intereſt cannot be ſurrendred, becauſe there is no reverſion wherein it may drowne; but by a ſurrender in law it may be drowned. As if the leſſee before *Michaelmaſſe* take a new leaſe for yeares either to begin preſently, or at *Michaelmaſſe*, this is a ſurrender in law of the former leaſe. *Fortior & æquior eſt diſpoſitio legis quam hominis* (2).

14 H. 7. 4. Lib. 6, f. 69. Sir Moyle Finche's caſe. (5 Rep. 11. 1 Leo. 323. 4 Rep. 53.) (10 Rep. 67. 6 Rep. 69. Cro. Jac. 84. 2 Roll. Abr. 494. Ant. 47. b. Dyer 58.) 19 H. 6. 33. 27 Aſſ. 46. 14 H. 7. 4. 1 H. 6. 1. Pl. Com. 541.

Alſo there is a ſurrender without deed, whereof *Littleton* putteth here an example of an eſtate for life of lands, which may be ſurrendred without deed, and without livery of ſeiſin; becauſe it is but a yeelding, or a reſtoring of the ſtate againe to him in the immediate reverſion or remainder, which are alwayes favoured in law. And there is alſo a ſurrender by deed; and that is of things that lie in grant, whereof a particular eſtate cannot commence without deed, and by conſequent the eſtate cannot be ſurrendred without deed. But in the example that *Littleton* here putteth, the eſtate

* *&c.* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 294.]

[338. a.]
(1) [See Note 295.]
(2) [See Note 296.]

eſtate might commence without deed, and therefore might be ſurrendred without deed. And albeit a particular eſtate be made of lands by deed, yet may it be ſurrendred without deed, in reſpect of the nature and qualitie of the thing demiſed, becauſe the particular eſtate might have beene made without deed; and ſo on the other ſide. If a man be tenant by the courteſie, or tenant in dower of an advowſon, rent, or other thing that lies in grant; albeit there the eſtate begin without deed, yet in reſpect of the nature and qualitie of the thing that lies in grant it cannot be ſurrendred without deed. And ſo if a leaſe for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet becauſe remainders and reverſions, though they be of lands, are things that lie in grant, they cannot be ſurrendred without deed. See in my Reports plentifull matter of ſurrenders. (Anſ. 225. b. Cro. Car. 399. 2 Roll. Abr. 498.)

"*Quære, ſi le fits la feme poit enter, &c.*" Here *Littleton* maketh a *quære*. So as grave and learned men may doubt, without any imputation to them; for the moſt learned doubteth moſt, and the more ignorant for the moſt part are the more bold and peremptory. (10 Rep. 66, 67.)

It is holden of ſome, that after the ſurrender the iſſue in taile during the life of tenant for life may enter; for that having regard to the iſſue, the ſtate for life is drowned, and conſequently the inheritance gained by the leaſe is by the acceptance of the ſurrender vaniſhed and gone: as if tenant in taile make a leaſe for life, whereby he gaineth a new reverſion (as hath beene ſaid) [338. b.] if tenant for life ſurrender to the tenant in taile, the eſtate for life being drowned, the reverſion gained by wrong is vaniſhed and gone, and he is tenant in taile againe againſt the opinion *obiter* of *Portington*, 21 *H.* 6. 53. 21 H. 6. 53.

But herein are two diverſities worthy of obſervation. The firſt is, that having regard to the parties to the ſurrender, the eſtate is abſolutely drowned, as in this caſe betweene the leſſee and the ſecond baron. But having regard to ſtrangers, who were not parties or privies thereunto, left by a voluntary ſurrender they may receive prejudice touching any right or intereſt they had before the ſurrender, the eſtate ſurrendred hath in conſideration of law a continuance (1). As if a reverſion be granted with warrantie, and tenant for life ſurrender, the grantee ſhall not have execution in value againſt the grantor, who is a ſtranger during the life of tenant for life; for this ſurrender ſhall worke no prejudice to the grantor who is a ſtranger. (Ant. 185. 8 Rep. 145.) 45 E. 3. 13. 5 H. 5. 9. 9 E. 4. 18.

So if tenant for life ſurrender to him in reverſion being within age, he ſhall not have his age; for that ſhould be a prejudice to a ſtranger, who is to become demandant in a reall action. 40 E. 3. 13. 9 E. 4. 18. 1 H. 6. 1.

If tenant for life grant a rent charge, and after ſurrender, yet the rent remaineth, for to that purpoſe he commeth in under the charge. *Cauſſa quæ ſupra.* 24 E. 3. 77. 5 H. 5. 8. 26 Aſſ. 38. 7 H. 6. b.

If a biſhop be ſeiſed of a rent charge in fee, the tenant of the land enfeoffe the biſhop and his ſucceſſors, the lord enter for the mortmaine, he ſhall hold it diſcharged of the rent; for the entrie for the mortmaine affirmeth the alienation in mortmaine, and the lord claimeth under his eſtate; but if tenant for life grant a rent (6 Rep. 79. 7 Rep. 38. Ant. 184. b.)

in

(1) On the ſurrender of terms of years by one termor for years to another termor for years, ſee Hughes v. Robotham, 1ſt Cro. 302.

in fee, and after infeoffe the grantee, and the leſſor enter for the forfeiture, the rent is revived, for the leſſor doth claime above the feoffment. But if I grant the reverſion of my tenant for life to another for terme of his life, and tenant for life attorne, now is the waſte of tenant for life diſpuniſhable (2). Afterwards I releaſe to the grantee for life and his heires, or grant the reverſion to him and his heires; now albeit the tenant for life be a ſtranger to it, yet becauſe he attorned to the grantee for life, the eſtate for life which the grantee had ſhall have no continuance in the eye of the law as to him, but he ſhall be puniſhed for waſte done afterward.

(Ant. 234.) 48 E. 3. 16. (Mo. 94.)

(Plo.Com.198.) The ſecond diverſitie is, that for the benefit of an eſtranger the eſtate for life is abſolutely determined. As if he in the reverſion make a leaſe for yeares, or grant a rent charge, &c. and then the leſſee for life ſurrender, the leaſe or rent ſhall commence *maintenant*. So in the caſe of *Littleton*, firſt, betweene the leſſee and the ſecond huſband, the ſtate for life is determined; and ſecondly, for the benefit of the iſſue it ſhall be ſo adjudged in law. Here note a diverſitie, when it is to the prejudice of a ſtranger, and when it is for his benefit.

If a man maketh a leaſe to *A.* for life, reſerving a rent of 40 ſhillings to him and his heires, the remainder to *B.* for life, the leſſor grant the reverſion in fee to *B.* *A.* attorne, *B.* ſhall not have the rent; for that although the fee ſimple doe drowne the remainder for life betweene them, yet as to a ſtranger it is *in eſſe*; and therefore *B.* ſhall not have the rent, but his heire ſhall have it.

(4 Leo. 37. Hob. 3.) Adjudge Mich. 16 & 17 Eliz. int. Turner pl. & Gray def. in ejectione firmæ in communi banco Rot. 945. Sir Francis Fleming's caſe. [a] 6 H. 4. 7. Pl. Com. 418. [b] 32 H. 8. Br. ſurrender 52. (2 Cro. 275. Mo. 54.)

A maſter of an hoſpitall being a ſole corporation, by the conſent of his brethren makes a leaſe for yeares of part of the poſſeſſions of the hoſpitall; afterwards the leſſee for yeares is made maſter, the terme is drowned; for a man cannot have a terme for yeares in his owne right and a freehold in *auter droit* to conſiſt together (as if a man leſſee for yeares take a feme leſſor to wife). (3) [a] But a man may have a freehold in his owne right and a terme in *auter droit*: and therefore if a man leſſor take the feme leſſee to wife, the terme is not drowned, but he is poſſeſſed of the terme in her right during the coverture [b]. So if the leſſee make the leſſor his executor, the terme is not drowned. *Cauſa quâ ſupra* (4).

But if it had beene a corporation aggregate of many, the making of the leſſee maſter had not extinguiſhed the terme, no more than if the leſſee had beene made one of the brethren of the hoſpitall.

* Sect. 637.

[*NOTA, que un eſtate taile ne poit eſte diſcontinue, mes la ou ceſtuy que fait le diſcontinuance fuit un foits ſeiſie per force de le taile, ſinon*

NOTE, that an eſtate taile cannot bee diſcontinued, but there where hee that makes the diſcontinuance was once ſeiſed by force of the

* The part of this Section within crotchets is not either in L. and M. nor Roh. nor MSS. and the remainder of this Section in thoſe copies immediately follows (with a ſmall variation) that part of the work which is diſtinguiſhed by Sect. 632.

(2) See note 2. ante 218. b.

(3) *Cont.* Lichden v. Winſmore, 1 Roll. Abr. 934.

(4) [See Note 297.]

*ſinon que ſoit per reaſon de garrantie, &c. Come] ſi ſoit aiel, pier, et fits, * et l'ayel ſoit tenant en taile, et eſt diſſeiſie per le pier que eſt ſon fits, et le pier fait un feoffment de ceo ſans garranty et devie, et puis l'aiel devie, le fits bien poit enter ſur le feoffee, per ceo que ceo ne fuit pas diſcontinuance, entant que le pier ne fuit ſeiſie per force de le taile al temps del feoffment, &c. mes fuit ſeiſie en fee per le diſſeiſin fait al ayel.*

the taile, unleſſe it be by reaſon of a warranty, &c. As if there be grandfather, father, and ſon, and the grandfather is tenant in taile, and is diſſeiſed by the father who is his ſon, and the father maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the ſon may wel enter upon the feoffee, becauſe this was no diſcontinuance, inaſmuch as the father was not ſeiſed by force of the entaile at the time of the feoffment, &c. but was ſeiſed in fee by the diſſeiſin of the grandfather.

"*UN foits.*" Here it is to bee obſerved, that it is not neceſſary that the tenant in taile bee ever ſeiſed of an eſtate taile at the time when the diſcontinuance of the whole eſtate is begun: as [339. a.] if tenant in taile make a leaſe for life, whereby he gaineth, as hath beene ſaid, a fee ſimple by wrong; in this caſe if he grant the reverſion in fee, and the leſſee dieth, the whole eſtate is diſcontinued; and yet at the time of the grant (by which the diſcontinuance continueth) hee was not ſeiſed by force of the taile; and therefore *Littleton* materially added theſe words (*un foits*) that is, that hee was once ſeiſed by force of the eſtate taile: and ſeeing that (as hath beene ſaid) a diſcontinuance is a privation, the rule of law agreeth well with the rule of philoſophie, that *omnis privatio præſupponit habitum*, and therefore he cannot diſcontinue that eſtate which he never had. Vide Sect. 658. (1 Roll. Abr. 634.) Vide Sect. 596. 597. 604. 640. 658.

d *Sinon que il ſoit per reaſon del garrantie, &c.*" For in many caſes a warrantie added to a conveyance is ſaid to make a diſcontinuance *ab effectu*, although he that made the conveyance was never ſeiſed by force of the eſtate taile, becauſe it taketh away the entrie of him that right hath, as a diſcontinuance doth. As if tenant in taile be diſſeiſed and dieth, and the iſſue in taile releaſe to the diſſeiſor with warrantie; in this caſe the iſſue was never ſeiſed by force of the taile; and yet this hath the effect of a diſcontinuance by reaſon of the warrantie, and the reaſon hereof appeareth before in this Chapter. 9 E. 4. 19. 12 E. 4. 11. 21 E. 4. 97.

"*Le fits poit enter.*" But if the father that made the feoffment had ſurvived the grandfather, he ſhould never have entred againſt his own feoffment; but albeit the father had ſurvived, yet after his deceaſe the ſonne ſhould have entred, for the reaſon here yeelded by *Littleton*. But if the feoffment had beene with warrantie, then it had wrought the effect of a diſcontinuance; and therefore *Littleton* ſaith *ſans garranty*, without warrantie. 15 E. 4. Diſcont. 30. & entr. Cong. 21. 21 E. 4. 97. 9 E. 4. 19. 39 H. 6. 45. 21 H. 6. 52. 12 E. 4. 11. (Ant. 265.)

1 Mar. Dier. 98.

* *et l'ayel ſoit tenant en taile, et eſt diſſeiſie per le pier que eſt ſon fits*, not in L. and M.

Sect. 638.

*ITEM, ſi tenant en taile fait un leaſe a un auter pur terme de vie, et le tenant en taile ad iſſue et devie, et le reverſion deſcendiſt a ſon iſſue, et puis l'iſſue granta le reverſion a luy diſcendue, a un auter en fee, et le tenant a terme de vie attourna * et devie, et le grantee del reverſion enter, &c. et eſt ſeiſie en fee en la vie del iſſue, et puis iſſue en le taile ad iſſue fits et devie, il ſemble que ceo n'eſt pas diſcontinuance a le fits, mes que le fitz poit enter, &c. pur ceo que ſon pier, a que le reverſion de fee ſimple diſcendiſt, &c. n'avoit unques riens en la terre per force de le taile, &c.*

ALSO, if tenant in taile make a leaſe to another for terme of life, and the tenant in tayle hath iſſue and dieth, and the reverſion deſcendeth to his iſſue, and after the iſſue granteth the reverſion to him deſcended, to another in fee, and the tenant for life attorne and die, and the grantee of the reverſion enter, &c. and is ſeiſed in fee in the life of the iſſue, and after the iſſue in [339. b.] tayle hath iſſue a ſon and dieth, it ſeemes that this is no diſcontinuance to the ſon, but that the ſon may enter, &c. for that his father, to whom the reverſion of the fee ſimple deſcended, had never any thing in the land by force of the entaile, &c.

OF this opinion is *Littleton* in our bookes.

15 E. 4. Diſcont. 30. 46 Ed. 3. 6. 21 H. 6. 52. 4 H. 7. 17. (1 Roll. Abr. 634.) (4 Leo. 19. 160. 156.)

"*Le grantee del reverſion enter, &c.*" Here it is to be underſtood and obſerved, that in this caſe of the grant of the reverſion *Littleton* doth not ſay *ſans garrantie*; becauſe if a warrantie had been added, it had wrought no diſcontinuance, for that (as hath beene ſaid) the diſcontinuance in judgement of law was but for life: but when the additiou of a warrantie doth worke a diſcontinuance, then *Littleton* ſaith, *ſans garrantie*, as you may obſerve often in this Chapter.

21 H. 6. 52, 53. (Ant. 333.)

Sect. 639.

CAR, ſi home ſeiſie en droit ſa feme, leſſa meſme la terre a un auter pur terme de vie, ore eſt le reverſion de fee ſimple a le baron, &c. Et ſi le baron moruſt, vivant ſa feme et le tenant a terme de vie, † et le reverſion diſcendiſt al heire le baron, ſi le heire le baron grant le reverſion a un auter en fee, et le tenant atturna, &c. et puis le tenaunt a terme de vie moruſt, et le grauntee del reverſion en cel caſe enter: ‡ en ceſt caſe ceo n'eſt pas

FOR if a man ſeiſed in the right of his wife, letteth the ſame land to another for terme of life, now is the reverſion of the fee ſimple to the huſband, &c. And if the huſband dieth, living his wife and the tenant for life, and the reverſion deſcend to the heire of the huſband, if the heire of the huſband grant the reverſion to another in fee, and the tenant attorne, &c. and afterwards the tenant for life dieth, and the

* *et devie, et le grantor del reverſion enter, &c.—&c. et puis le tenant a terme de vie moruſt, et celuy en le reverſion entra, &c.* L. and M. and Roh.

† *et* not in L. and M. nor Roh.

‡ *en ceſt cas* not in L. and M. nor Roh.

pas diſcontinuance a la feme, mes la feme bien poit enter ſur le grantee, &c. pur ceo que le grantor n'avoit riens al temps del graunt, en le droit la feme, quant il fiſt le graunt del reverſion.

the grantee of the reverſion in this caſe enter: in this caſe this is no diſcontinuance to the wife, but ſhe may well enter upon the grantee, &c. becauſe the grantor had nothing at the time of the graunt, in the right of his wife, when hee made the graunt of the reverſion.

"*CAR ſi home ſeiſie en droit ſa feme, leſſa, &c.*" Here *Littleton* putteth his caſe where the baron onely makes a leaſe for life; for if he and his wife joyne in a leaſe by deed, there the reverſion is not diſcontinued. See before, *Sect.* 620. More need not to be ſaid hereof, in reſpect the like caſe of tenant in taile hath been explained before.

14 E. 3. Diſcont. 5.
18 Aſſ. p. 2.
18 E. 3. 54.
38 E. 3. 32.
22 H. 6. 24.
21 H. 6. 52, 53.
15 E. 4. Diſcont. 30.

[340. a.]

Sect. 640.

(1 Roll. 634.)

ET iſſint il ſemble, coment que homes queux ſont inheritables per force de le taile, et ils ne fueront unques ſeiſies per force de meſme le taile, que tiel feoffements ou grants per eux fait ſans clauſe de warrantie, n'eſt pas diſcontinuance a lour iſſues apres lour deceaſe, mes que lour iſſues poyent bien enter, &c. comunt que ceux queux fierent tielz grants en lour vies fueront forbarres d'entrer per lour fait demeſne, &c.

AND ſo it ſeemeth, that men which are inheritable by force of an entaile, and never were ſeiſed by force of the ſame entaile, that ſuch feoffements or grants by them made without clauſe of warrantie, is no diſcontinuance to their iſſues after their deceaſe, but that their iſſues may well enter, &c. albeit they which made ſuch graunts in their lives were forebarred to enter by their owne act, &c.

Sect. 641.

(10 Rep. 95.)

*ET ſi le tenant en taile ad iſſue deux fits, et l'eigne diſſeiſiſt ſon pier, et ent fait feoffment en fee ſans clauſe de garrantie, et devia ſans iſſue, et puis le pier devie, le puiſne fits poit bien enter ſur le feoffee; pur ceo que le feoffment ſon eigne frere ne poit eſtre diſcontinuance, pur ceo que il ne fuit unques ſeiſie per force de meſme le taile. Car il ſemble encounter reaſon, que per matter en fait, &c. ſans clauſe de garrantie, home poit diſcontinuer un * fait, &c. que ne fuit unques*

AND if tenant in taile hath iſſue two ſonnes, and the eldeſt diſſeiſeth his father, and thereof maketh a feoffement in fee without clauſe of warrantie, and die without iſſue, and after the father die, the youngeſt ſon may well enter upon the feoffee; for that the feoffement of his elder brother cannot be a diſcontinuance, becauſe he was never ſeiſed by force of the ſame tayle. For it ſeemeth to be againſt reaſon, that by matter in fact, &c. without clauſe of warrantie,

* *feit—tail*, L. and M.

*inques ſeiſie per force de meſme le taile**.

warrantie, a man ſhould diſcontinue a deed, &c. that was never ſeiſed by force of the ſame taile.

Vide Sect. 592. 596, 597. 601. 658.

NOTE, there alſo in theſe two Sections appeareth, that (as hath beene ſaid before) a warrantie, though he were never ſeiſed by force of the taile, may worke the effect of a diſcontinuance.

"*Home poet diſcontinuer un fait, &c.*" This is miſtaken, and ſhould be, *home poet diſcontinuer un taile*; and ſo is the originall.

Sect. 642. [340. b]

†*NOTA, ſi ſoit ſeignior et tenant, et le tenant dona les tenements a un auter en* ‡ *taile, le remainder a un auter en fee, et puis le tenant en taile fait un leas a un home pur terme de vie, &c. ſavant le reverſion, &c. et puis granta le reverſion a un auter en fee, et le tenant a terme de vie atturna, &c. et puis le grantee del reverſion moruſt ſans heire, ore meſme le reverſion devient al ſeignior per voy d'eſcheate. Si en ceſt cas le tenant a terme de vie deviaſt, et le ſeignior per force de ſon eſcheate enter en la vie le tenant en le taile, et puis le tenant en le taile moruſt, il ſemble en ceo cas que ceo n'eſt pas diſcontinuance al iſſue en le taile, ne a celuy en le remainder, mes que il poit bien enter, pur ceo que le ſeignior eſt eins per voy d'eſcheat, et nemy per le tenant en le taile, &c. Mes* ſecus eſſet, *ſi le reverſion uſt eſte executе en le grantee en le vie de tenant en le taile, car adonque uſt le grantee eſt eins en les tenements per le tenant en le tayle,* ‡ *&c.*

NOTE, if there be lord and tenant, and the tenant giveth lands to another in taile, the remainder to another in fee, and after the tenant in taile makes a leaſe to a man for a terme of life, &c. ſaving the reverſion, &c. and after granteth the reverſion to another in fee, and the tenant for life attorne, &c. and after the grantee of the reverſion die without heire, now the ſame reverſion commeth to the lord by way of eſcheat. If in this caſe the tenant for life dieth, and the lord by force of his eſcheat enter in the life of tenant in taile, and after the tenant in taile dieth, it ſeemeth in this caſe that this is no diſcontinuance to the iſſue in taile, nor to him in the remainder, but that he may well enter, becauſe the lord is in by way of eſcheat, and not by the tenant in tayle. But otherwiſe it ſhould bee, if the reverſion had beene executed in the grantee, in the life of tenant in tayle, for then had the grantee been in the tenements by the tenant in taile, &c.

Vide Sect. 620.

THE reaſon of this caſe is here rendred (as before it was in this Chapter), that albeit the reverſion be executed in the lord by eſcheat in the life of tenant in taile, yet becauſe he is not in by the tenant in taile but by eſcheat, it worketh no diſcontinuance. But

* *&c.* added in L. and M. and Roh.
† *Nota,—Item,* L. and M. and Roh.
‡ *taile, le remainder a un auter en,* not in L. and M. nor Roh.
‡ *&c.* not in L. and M. nor Roh.

But if it had beene executed in the life of tenant in taile in the grantee which was in by tenant in taile, then the lord by eſcheat ſhould have taken advantage of it. But of this ſufficient hath beene ſaid before in this Chapter. Lib. 1. fol. 136. Lib. 3. fol. 62, 63.

Sect. 643, 644, & 645.

ITEM, ſi un parſon d'un eſgliſe ou un vicar d'un eſgliſe, alien certaine terres ou tenements parcel de ſon glebe, &c. a un auter en fee, et moruſt, ou reſigne, &c. ſon ſucceſſor poit bien enter, nient contriſteant tiel alienation, come eſt dit en un Nota 2 H. 4. *Terme Mich.* quod ſic incipit.

ALSO, if a parſon of a church or vicar of a church alien certaine lands or tenements parcell of his glebe, &c. to another in fee, and die or reſigne, &c. his ſucceſſor may well enter, notwithſtanding ſuch alienation, as is ſaid in a *Nota* 2 *H.* 4. *Termino Mich.* which beginneth thus.

Sect. 644.

NOTA quod dictum fuit pro lege, *en un briefe de accompt port per un maſter d'un college* vers un chapleine, que ſi un parſon, ou un vicar, graunt certaine terre quel eſt de droit ſon eſgliſe a un auter et devie, ou permute, le ſucceſſor poit enter, &c. Et jeo croy que la cauſe eſt, pur ceo que le parſon, ou vicar, que eſt ſeiſie, &c. come en droit de ſon eſgliſe, n'ad pas droit de fee ſimple en les tenements, † et le droit de fee ſimple de ceo demurt en aſcun auter perſon; et pur cel cauſe ſon ſucceſſor poit bien enter, nient contriſteant tiel alienation, &c.*

NOTA quod dictum fuit pro lege, in a writ of account brought by a maſter of a college againſt a chaplaine, that if a parſon, or vicar, grant certaine land which is of the right of his church to another and die, or changeth, the ſucceſſor may enter, &c. And I take the cauſe to bee, for that the parſon, or vicar, that is ſeiſed, &c. as in right of his church, hath no right of the fee ſimple in the tenements, but the right of the fee ſimple abideth in another perſon; and for this cauſe his ſucceſſour may well enter, notwithſtanding ſuch alienation, &c.

Sect. 645.

CAR un eveſque poit aver breve de droit de † tenements de droit de ſon eſgliſe, pur ceo que le droit eſt en ſon chapiter, et le fee ſimple demurrant en

FOR a biſhop may have a writ of right of the tenements of the right of his church, for that the right is in his chapiter, and the fee ſimple abideth

* *vers un chapleine—d'un chapel,* L. and M. and Roh.

† *et—re,* L. and M. and Roh.

† *tenements de droit de ſon eſgliſe, pur ceo que le droit eſt en ſon chapiter, et le*—not in L. and M. nor Roh.

en luy et en ſon chapiter. Et un deane poit aver breve de droit, pur ceo que le droit demurt en luy. ‡ *Et un abbe poit aver briefe de droit, pur ceo que le droit demurt en luy et en ſon covent. Et un maſter d'un hoſpitall poit aver briefe de droit, pur ceo que le droit demurt en luy et en ſes confreres, &c.* Et ſic de aliis § caſibus conſimilibus. ‖ *Mes un parſon ou un vicar ne poit aver briefe de droit, &c.*

abideth in him and in his chapiter. And a deane may have a writ of right, becauſe the right remaynes in him. And an abbot may have a writ of right, for that the right remaynes in him and in his covent. And a maſter of an hoſpitall may have a writ of right, becauſe the right remaineth in him and in his confreres, &c. And ſo of other like caſes. But a parſon or vicar cannot have a writ of right, &c.

[a] 8 H. 6. 24. 12 H. 8. 8.

"*PARCEL de ſon glebe, &c.*" In whom the fee ſimple of the glebe is, is a queſtion in our bookes. [a] Some [341. a.] hold that it is in the patron; but that cannot be for two reaſons. Firſt, for that in the beginning the land was given to the parſon and his ſucceſſors, and the patron is no ſucceſſor. Secondly, the words of the writ of *juris utrùm* be, *ſi ſit libera eleemoſina eccleſiæ de D.* and not of the patron. Some others doe hold that the fee ſimple is in the patron and ordinary; but this cannot be, for the cauſes aboveſaid: and therefore, of neceſſitie, the fee ſimple is in abeyance, as *Littleton* ſaith. And this was provided by the providence and wiſdome of the law; for that the parſon and vicar have *curam animarum*, and were bound to celebrate divine ſervice, and adminiſter the ſacraments; and therefore no act of the predeceſſor ſhould make a diſcontinuance to take away the entry of the ſucceſſor, and to drive him to a reall action, whereby he ſhould be deſtitute of maintenance in the meane time. Upon conſideration of all our bookes I obſerve this diverſitie: that a parſon or vicar, for the benefit of the church and of his ſucceſſor, is in ſome caſes eſteemed in law to have a fee ſimple qualified; but to doe any thing to the prejudice of his ſucceſſor in many caſes, the law adjudgeth him to have in effect but an eſtate for life. *Cauſæ eccleſiæ publicis cauſis æquiparantur:* and *Summa ratio eſt quæ pro religione facit.* And *Eccleſia fungitur vice minoris, meliorem facere poteſt conditionem ſuam, deteriorem nequaquam.*

Vide Regiſtr. 307. a. 45 E. 3. tit. Eſchange. 12 H. 8. 9. (F. N. B. 48, 49. a.) F. N. B. 19 L. (Dyer 71. a. 2 Roll. Abr. 839.)

Bracton lib. 4. fol. 226. Brit. fol. 143.

As a parſon, vicar, archdeacon, prebend, chantery prieſt, and the like, may have an action of waſte, and in the writ it ſhall be ſaid, *ad exhæredationem eccleſiæ, &c. ipſius B.* or *præbendæ ipſius d.*

F. N. B. 55 D. & 57 E. F. 10 H. 7. 5.

And the parſon, &c. that maketh a leaſe for life, ſhall have a *conſimili caſu* during the life of the leſſee, and a writ of entrie *ad communem legem* after his death, or a writ *ad terminum qui præteriit*, or a *quòd permittat* in the *debet*, and none can maintaine any of theſe writs, but a tenant in fee ſimple or fee tayle. [341. b.]

F. N. B. 49. l. m. n. 20 E. 3. tit. Juris utrum. Temps E. 3. Juris utrum 14. 1. 14 E. 3.

ibid. 4. F. N. B. 50. 30 E. 3. 26. 21 E. 3. 11. tit. Entrie 10. F. N. B. 206. F. Regiſtr. 237. 4 E. 4. 2. 8 E. 3. tit. Entrie 3. 7 H. 3. 54, 55. (Ant. 67. a.)

And a parſon, &c. may receive homage, which tenant for life cannot doe. *Temps E.* 1. *Incumbent* 19.

[c] F. N. B. 49. L. 50. a.

[c] Likewiſe a parſon, &c. ſhall have a writ of meſne, and a *contra formam feoffamenti.*

But

‡ *Et un abbe poet aver briefe de droit, pur ceo que le droit demurt en luy,* not in L. and M. nor Roh.

§ *in* added L. and M. and Roh.

‖ *&c.* added L. and M. and Roh.

But a parſon cannot make a difcontinuance, as *Littleton* here teacheth; for that ſhould be to the prejudice of his ſucceſſor to take away his entrie, and to drive him to a reall action.

Alſo if a parſon, &c. make a leaſe for yeares, reſerving a rent, and dieth, the leaſe is determined by his death; as if tenant for life had made a leaſe, no acceptance of the rent by the ſucceſſor can make it good. Alſo in a reall action a parſon, vicar, archdeacon, prebend, &c. ſhall have aid of the patron and ordinarie, as tenant for life ſhall have. So as it is evident, that to many purpoſes a parſon hath but in effect an eſtate for life, and to many a qualified fee ſimple, but the entire fee and right is not in him; and that is the reaſon that hee cannot difcontinue the fee ſimple that he hath not, nor ever had; for, as it hath beene ſaid, *Omnis privatio præſupponit habitum.* And for the ſame cauſe he cannot have a writ of right right, nor a writ of right in its nature; as a writ of right *ſur diſclaimer* of cuſtomes and ſervices, *ne in juſtè vexes, rationabilibus diviſis, quo jure*, and the like.

(1 Roll. Abr. 476. 479. 488. Cro. Car. 38. 5 Rep. 81. 2 Roll. Abr. 63. 334.) 20 E. 3. tit. Aid. 30. 25 E. 3. 54. 8 E. 3. 45. 8 H. 6. 24. 11 H. 6. 9. 6 E. 3. 45. 43 Aſſ. Pl. 13. F. N. B. 129. (Plo. 538.)

But here it appeareth by *Littleton*, that ſuch bodies politike or corporate as have a ſole ſeiſin, and may have a writ of right, for that the fee and right is in them (albeit they cannot abſolutely convey away their lands, &c. without aſſent of others), may make a diſcontinuance; as a biſhop, an abbot, a deane, a maſter of an hoſpitall, and the like. But this is to bee underſtood where a deane or a maſter of an hoſpitall, &c. are ſolely ſeiſed of diſtinct poſſeſſions: for if the bodie that is ſeiſed be aggregate of many, as the deane and chapiter, maſter and confreres, &c. then the feoffment of the deane or maſter is ſo farre from a diſcontinuance as it is a diſſeiſin.

(2 Cro. 200. Ant. 325. b. Plo. 356. Doc. Pla. 27. 271.)

And theſe that have the fee and right in them ſhall not have aid in reſpect of their high and large eſtate, albeit any of them be preſentable: but a deane that is collative ſhall have aid of the king.

44 E. 3. 11. 11 H. 4. 68. 9 E. 4. 16. 18 E. 3. 7. 6 E. 3. 11.

And it is to be obſerved, that the remedie is ever agreeable to the right: and therefore the biſhop, deane, maſter of an hoſpitall, that hath college and common ſeale, or the like, ſhall have a writ of right right, which is the higheſt remedie, for that they have the higheſt eſtate.

5 E. 2. Aid 167. 12 H. 4. 11. 32 E. 3. Aid 39. 38 E. 3. 19. 14 E. 3. Juriſutrum 4.

[342. a.] Here *Littleton* citeth the booke caſe, *Mich.* 2 *H.* 4. as an authoritie whereupon he groundeth his opinion. And it is to be obſerved, that the yeares of *H.* 4. were publiſhed before *Littleton* did write.

But at this day, the biſhop, deane, maſter of an hoſpitall, or the like, that have the fee and right in them, as hath beene ſaid, cannot difcontinue; neither can they or any parſon, vicar, archdeacon, prebend, or any other having any eccleſiaſticall living, with aſſent of deane and chapiter, patron and ordinary, or the conſent of any others, make any leaſe, gift, grant or conveyance, eſtate, charge or incumberance to binde his ſucceſſor other than for terme of one and twentie yeares, or three lives in poſſeſſion, whereupon the accuſtomed rent or more ſhall be reſerved. Theſe be excellent lawes, and have beene well expounded for the maintenance of religion and the good of God's church; for otherwiſe it is to bee feared that holy church would loſe more than it would gaine in theſe dayes.

Vide Sect. 527. 593, &c. 1 Eliz. c. 18. 13 Eliz. c. 10. 1 Jacobi cap. 3.

Lib. 1. fol. 46. Lib. 4. fol. 76. & 20. Lib. 5. fol. 9 & 14. Lib. 6. fol. 37. Lib. 7. fol. 8. Lib. 11. fol. 67. 37 H. 8. 31 H. 8. 32 H. 8. 37 H. 8. 1 E. 6. &c.

But where *Littleton*, in this and other Sections, makes mention of maſters of hoſpitals, the reader muſt know, that ſince *Littleton* wrote, there hath beene a great alteration made by divers acts of parliament concerning hoſpitals.

" *Maſter del hoſpitall.*" Theſe points concerning hoſpitals were reſolved [c] by the juſtices.

[c] Paſch. 24 Eliz. the Lord Cheneye's caſe. Lib. 2. fol. 48, 49. Eveſque de Canterburie's caſe. (2 Sid. 48.)

Firſt, that no hoſpitall was given to the crowne by the ſtatute of 27 *H.* 8. nor any hoſpitall is within the ſtatute of 31 *H.* 8. of monaſteries, but only religious and eccleſiaſticall hoſpitals, and that no lay hoſpitall was within thoſe ſtatutes.

Secondly, if upon the foundation of any lay hoſpitall, or after it was ordained, that one or divers prieſts ſhould be maintained within the hoſpitall to celebrate divine ſervice to the poore, and to pray for the ſoule of the founder, and all chriſtian ſoules, or the like; and that the poore of ſuch hoſpitall ſhould make the like oriſons, yet ſuch an hoſpitall is not within the ſaid ſtatutes; for the hoſpitall is lay, and not religious; and all or the moſt part of antient lay hoſpitals were founded or ordained after the like ſort; and the makers of thoſe ſtatutes never intended to overthrow workes of charitie, but to take away the abuſe.

Lib 1. f. 24. Porter's caſe.

Thirdly, that no hoſpitall was given to the king by the ſtatute of 37 *H.* 8. but in two caſes, where the donors, founders or patrons, &c. had entred and expulſed the prieſts, wardens, &c. betweene the fourth day of Februarie, *Anno* 27 *H.* 8. and the five and twentieth of December, *Anno* 37 *H.* 8. or where king *Henry* the eighth, by commiſſion according to that act, ſhould enter and ſeiſe the ſame; but that determined by the death of that king.

Porter's caſe ubi ſupra. Lib. 4. 111. 113, 114. 116. in Lambert's caſe. Eccleſiaſticus p. 34. ver. 22. (8 Rep. 131. a.)

Fourthly, that the ſtatute of 1 *E.* 6. extended not to any hoſpitall whatſoever, either lay or religious, as by the ſame appeareth.

And I was of counſell with the lord *Cheney* in this caſe, which, ſeeing it may doe good for maintenance of charitable uſes, I thought good ſummarily to report it. To this I will adde, *Panis pauperum vita pauperum; qui defraudat eos vir ſanguinis eſt.*

Nota, Of hoſpitals, ſome are corporations aggregate of many; as of maſter or warden, &c. and his confreres: ſome, where the maſter or warden hath only the eſtate of inheritance in him, and the brethren or ſiſters power to conſent, having college and common ſeale: ſome, where the maſter or warden hath the ſtate in him, but hath no college and common ſeale; and ſuch a maſter or warden ſhall have a *juris utrùm*: and of theſe hoſpitals ſome bee eligible, ſome donative, and ſome preſentable.

14 E. 3. juris utrum 4.

(F. N. B. 48.)

Sect. 646.

MES le pluis haut briefe que ils poient aver eſt le briefe de juris utrùm, *le quel eſt graund proofe que le droit de fee n'eſt en eux, ne en nul autres, &c. Mes le droit de fee ſimple eſt en abeiance, &c. ceo eſt a dire, que il eſt tantſolement en le remembrance, entendement et conſideration de la ley, &c.*

BUT the higheſt writ that they can have is the writ of *juris utrùm*, which is a great proofe that the right of fee is not in them, nor in any others, &c. But the right of the fee ſimple is in abeiance, that is to ſay, that it is only in the remembrance, intendment and conſideration

[342. b.] * &c. *Car moy semble que tiel chose † et tiel droit que est dit en divers livres estre en abeyance, est † a tant a dire en Latyne (scilicet)*, Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus. ‡ *Mes jeo suppose que ils intenderont per ceux parols*, in nubibus, &c. *come jeo aye dit adevant.* §

tion of the law, &c. for it seemeth to me, that such a thing and such a right which is sayd in divers bookes to be in abeyance, is as much to say in Latine (scilicet), *Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus.* But I suppose, that they meane by these words *(in nubibus, &c.)*, as I have said before.

"*EN abeiance.*" (1) That is, in expectation, of the French word *bayer*, to expect. For when a parson dieth, wee say that the freehold is in abeyance, because a successor is in expectation to take it; and here note the necessitie of the true interpretation of words.

If tenant *pur terme d'auter vie* dieth, the freehold is said to be in abeyance untill the occupant entreth. If a man make a lease for life, the remainder to the right heires of *I. S.* the fee simple is in abeyance untill *I. S.* dieth. And so in the case of the parson, the fee and right is in abeiance, that is, in expectation, in remembrance, entendment, or consideration of law, 1. *In consideratione sive intelligentiâ legis*, because it is not in any man then living; and the right that is in abeiance is said to be *in nubibus*, in the clouds, and therein hath a qualitie of fame whereof the poet speaketh:

24 E. 3. 63. Vi. Sect. 648, 649, 650, 651. Vide Sect. 1. (Hob. 338. Ant. 263. b, 2 Roll. 339. Post. 345. a. 1 Rep. 66.)

Ingrediturque solo, et caput inter nubila condit. Virg. 4. Æneid.

Sect. 647.

ITEM, si un parson d'un esglise devie, ore le franktenement del glebe del parsonage est en nulluy durant le temps que le parsonage est voide, mes in abeiance; c'estascavoir, in consideration et en le intelligence de le ley, tanque un auter soit fait parson de mesme l'esglise: et immediat quant un auter est ‖ fait parson, le franktenement en fait est en luy come successor. ¶

ALSO, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is voide, but in abeiance, viz. in consideration and in the understanding of the law, untill another be made parson of the same church; and immediatly when another is made parson, the freehold in deed is in him as successor.

"*SI*

* &c. not in L. and M. nor Roh.
† *et—est*, L. and M. and Roh.
‡ &c. added L. and M. and Roh.
‡ *Mes jeo suppose que ils intenderont per ceux parols, in nubibus*, &c. not in L. and M. nor Roh.
§ &c. added L. and M. and Roh.
‖ *fait* not in L. and M. nor Roh.
¶ &c. added L. and M. and Roh.

(1) [See Note 298.]

"*SI un parſon d'un eſgliſe devie, &c.*" So it is of a biſhop, abbot, deane, archdeacon, prebend, vicar, and of every other ſole corporation or body politike, preſentative, elective, or donative, which inheritances put in abeiance are by ſome called *hæreditates jacentes*; and ſome ſay, *que le fee eſt en balaunce.*

Bract. li. 1. c. 2. Brit. f. 249.

Sect. 648. [343. a.]

*ITEM, aſcuns peradventure voilent arguer et dire, que entant que un parſon ove l'aſſent del patron et ordinarie, poit granter un rent charge hors del glebe del parſonage en fee, et iſſint charger le glebe del parſonage perpetualment, ergo ils ont fee ſimple, ou deux ou un de eux avoit fee ſimple * al meins †. A ceo poit eſtre reſpondue, que il eſt principle en le ley, que de cheſcuns terres il y ad fee ſimple, &c. en aſcun home, ou ‡ auterment le fee ſimple eſt en abeyance ‖. Et un auter principle eſt, que cheſcun terre de fee ſimple poit eſtre charge de un rent-charge en fee per un voy ou per auter. Et quant tiel rent eſt graunt per le fait le parſon, et le patron, et l'ordinarie, &c. en fee, nul avera prejudice ou parde per force de tiel grant, forſque les § grantors en lour vies, et les heires le patron, et les ſucceſſors del ordinary apres lour deceaſe. Et apres tiel charge, ſi le** parſon devie, ſon ſucceſſour ne poit vener a le dit eſgliſe de eſtre parſon de meſme le eſgliſe per la ley, forſque per preſentment del patron, et admiſſion et inſtitution del ordinarie. †† Et pur cel cauſe il covient que le ſucceſſor ſoy teigne content, et agree de ceo que ſon patron et l'ordinarie loyalment feſoyent adevant, &c. Mes ceo n'eſt proofe que le fee ſimple, &c. eſt en le patron et l'ordinarie, ou en aſcun de eux, &c. Mes la cauſe que tiel grant de rent-charge ‡‡ eſt bone,*

ALSO, ſome peradventure wil argue and ſay, that inaſmuch as a parſon with the aſſent of the patron and ordinary, may grant a rent charge out of the glebe of the parſonage in fee, and ſo charge the glebe of the parſonage perpetually, *ergo* they have a fee ſimple, or two or one of them have a fee ſimple at the leaſt. To this may bee anſwered, that it is a principle in law, that of everie land there is a fee ſimple, &c. in ſome bodie, or otherwiſe the fee ſimple is in abeyance. And there is another principle, that every land of fee ſimple may bee charged with a rent charge in fee by one way or other. And when ſuch rent is granted by the deed of the parſon, and the patron, and ordinarie, &c. in fee, none ſhall have prejudice or loſſe by force of ſuch grant, but the grantors in their lives, and the heires of the patron, and the ſucceſſours of the ordinarie after their deceaſe. And after ſuch charge if the parſon die, his ſucceſſor cannot come to the ſayd church to be parſon of the ſame by the law, but by the preſentment of the patron, and admiſſion and inſtitution of the ordinarie. And for this cauſe the ſucceſſour ought to hold himſelfe content, and agree to that which his patron and the ordinarie have lawfully done before, &c. But this is no proofe that the fee ſimple, &c.

* *al—an*, L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *auterment* not in L. and M. nor Roh.
‖ *&c.* added L. and M. and Roh.
§ *grantors—grantees*, L. and M. and Roh.
** *parſon* not in L. and M. nor Roh.
†† *&c.* added L. and M. and Roh.
‡‡ *&c.* added L. and M. and Roh.

bone, eſt, pur ceo que ceux queux averont intereſt, &c. en la dit egliſe, ſcilicet, le patron ſolonque la ley temporal, et l'ordinarie ſolonque la ley ſpiritual, ſueront aſſentus, ou parties a tiel charge, &c. Et ceo ſemble eſtre la verie cauſe que tiel glebe poit eſtre charge en perpetuitie, || &c.

&c. is in the patron and the ordinarie, or in either of them, &c. But the cauſe that ſuch graunt of rent-charge is good, is, for that they who have the intereſt, &c. in the ſayd church, viz. the patron according to the law temporall, and the ordinarie according to the law ſpiritual, were aſſenting, or parties to ſuch charge, &c. And this ſeemeth to be the true cauſe why ſuch glebe may be charged in perpetuitie, &c.

"*IL eſt un principle en la ley, &c.*" *Principium, quod eſt quaſi primum caput*, from which many caſes have their originall or beginning, which is ſo ſtrong, as it ſuffereth no contradiction; and therefore it is ſaid in our books, that ancient principles of the law [a] ought not to be diſputed, *Contra negantem principia non eſt diſputandum*. That which our author here calleth a principle, *Sect.* 3 & 90. he calleth a maxime. (Ant. 10. b.) [a] 11 H. 4. 9. Sect. 3 & 90.

Here *Littleton* in anſwer to an objection alleageth two principles. Firſt,

"*Que de cheſcun terre il y ad fee ſimple, &c.*" This is *perſpicuè verum*, and needeth no explanation. Secondly,

"*Cheſcun terre de fee ſimple poet eſtre charge en fee per un voy ou auter.*" Hereby it appeareth, that albeit the right of the fee ſimple be in abeyance, yet it may be charged by one way or another. And ſo it may be aliened in fee, albeit the right of the fee be in abeyance, or in conſideration of law. And herein is a diverſitie worthy the obſervation to be made, that when the right of fee ſimple is perpetually by judgement of law in abeyance, without any expectation to come *in eſſe*, there he that hath the qualified fee, *concurrentibus iis quæ in jure requiruntur*, may charge or alien it, as in the caſe of parſon, vicar, prebend, &c. But where the fee ſimple is in abeyance, and by poſſibilitie may every houre come *in eſſe*, there the fee ſimple cannot be charged untill it commeth *in eſſe*. (1) As if a leaſe for life be made, the remainder to the right heires of *I. S.* the fee ſimple cannot be charged till *I. S.* be dead. [343. b.] And ſo is *Littleton* to be underſtood, viz. that either it may be charged *in præſenti*, or *in futuro*. (Lampet's caſe, 10 Rep. 46. b.) (2 Roll. 418, 419.)

"*Cheſcun terre de fee ſimple.*" And ſo it is of lands entailed, for they may be charged in fee alſo; for the eſtate taile may be cut off by fine or recovery. Alſo the eſtate taile may continue, and yet tenant in taile may lawfully charge the land and binde the iſſue in taile. As if a diſſeiſor make a gift in taile, and the donee in conſideration of a releaſe by the diſſeiſee of all his right to the donee, granteth a rent charge to the diſſeiſee and his heires, proportionable to the value of his right, this ſhall binde the iſſue in taile. *Vide Sect.* 1. *Bridgewater's* caſe; which lands, by the rule of 44 E. 3. 21, 22. (Plo. Com. 436.) Vide Sect. 1. Bridgewater's caſe, & 59.

|| *&c.* not in L. and M. nor Roh.

(1) On the queſtion, whether the fee ſimple, during the ſuſpence of a contingent remainder, remains in the grantor, or is in abeyance, ſee Mr. Fearne's Eſſay on Contingent Remainders, 3d ed. 275.

of *Littleton*, may be charged: and therefore if the owner of thoſe thirteene acres grant a rent-charge out of thoſe thirteene acres generally, lying in the meadow of eightie, without mentioning where they lie particularly; there, as the ſtate in the land removes, the charge ſhall remove alſo. But ſince our author wrote, all eccleſiaſticall perſons are diſabled to charge in fee any of their eccleſiaſticall poſſeſſions, as before hath beene ſpoken of at large.

Vide Sect. 593. (Doct. and Stud. 50. a.) 31 E. 1. tit. Grant. 90. 8 R. 2. Annuit. 53. (2 Cro. 197.)

"*Et quant tiel rent eſt grant, &c.*" This is an excellent interpretation and limitation of the ſaid principle, viz. that none ſhall have prejudice or loſſe by any ſuch grant, but ſuch as are partie or privie thereunto; as the patron and his heires, the ordinary and his ſucceſſors, and the parſon and his ſucceſſors; which ſucceſſors of the parſon are to be preſented by the patron or his heires, and admitted and inſtituted by the ordinary or his ſucceſſors. The like is to be ſaid of an archdeacon, prebend, vicar, chauntrie prieſt, and the like.

(5 Rep. 81.) 16 E. 3. Annuit. 24. 40 E. 3. 30. 3 E. 3. 17. Reg. 38. (Doct. & Stud. 56. b.)

"*Per le fait le parſon, et patron, et l'ordinarie, &c.*" Yet if the parſon die, and in time of vacation the patron, of the aſſent of the ordinary, or the patron and ordinary grant an annuitie or rent-charge out of the glebe, this ſhall (as hath beene ſaid) binde the ſucceeding parſons for ever.

If there be parſon, patron, and ordinary, and the parſon by the ordinance and aſſent of the ordinarie grant an annuitie to another, having *quid pro quo* in conſideration thereof, [344. a.] this ſhall binde the ſucceſſor of the parſon, without the conſent of the patron.

6 E. 3. 4. 55. 7 E. 3. 40, 41. F. N. B. 152. 17 E. 3. 32. 39 E. 3. 17. b. 11 H. 4. 68. 8 H. 3. 23. Vi. Sect. 133. 530. 11 E. 3. Jur. utr. 3. 8 Aſſ. 29. 31. 13 Aſſ. 2.

A church parochiall may be donative and exempt from all ordinarie juriſdiction, and the incumbent may reſigne to the patron, and not to the ordinarie; neither can the ordinarie viſit, but the patron by commiſſioners to be appointed by him. And by *Littleton's* rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet *mere laicus* is not capable of it, but an able clerke *infra ſacros ordines* is; for albeit hee come in by lay donation, and not by admiſſion or inſtitution, yet his function is ſpirituall: and if ſuch a clerke donative be diſturbed, the patron ſhall have a *quare impedit* of this church donative, and the writ ſhall ſay, *quòd permittat ipſum præſentare ad eccleſiam, &c.* and declare the ſpeciall matter in his declaration. And ſo it is of a prebend, chantery, chappell, donative, and the like; and no laps ſhall incurre to the ordinary, except it be ſo ſpecially provided in the foundation. But if the patron of ſuch a church, chantery, chappell, &c. donative, doth once preſent to the ordinarie, and his clerke is admitted and inſtituted, it is now become preſentable, and never ſhall be donative after, and then laps ſhall incurre to the ordinary, as it ſhall of other benefices preſentable. But a preſentation to ſuch a donative by a ſtranger, and admiſſion and inſtitution thereupon, is meerely void. And all this was reſolved by the whole court of king's bench, for the rectorie parochiall donative of Saint *Burian* in the countie of Cornewall.

14 H. 3. Quar. Imp. 183. 17 E. 3. 12. 64. 14 H. 4. 11. F.N.B. 33. c.16. c. 3. Bre. 660. 13 E. 4. 3. 6 H. 7. 14. Vid. Sect. 530. 22 H. 6. 26. F. N. B. 35. c.

Hil. 1 Jac. coram Reg. rot. 601. inter Wil. Fairchild, pl. & Wil. Gayer def. in Treſpas.

It appeareth by our bookes, and by divers acts of parliament, that at the firſt all the biſhopricks in England were of the king's foundation, and donative *per traditionem baculi, (id eſt)* the croſier, which was the paſtorall ſtaffe, *& annuli*, the ring whereby hee was married to the church. And king *Henry* the firſt being requeſted by

1 E. 3. 8. 40. 6 E. 3. 10. 25 E. 3. ca. Unico de Proviſor. Math. Par. pa. 10 & 62.

by the biſhop of Rome to make them elective, refuſed it: but king *John* by his charter bearing date *quinto Junii anno decimo ſeptimo*, granted that the biſhopricks ſhould be eligible. If the king doth found a church, hoſpitall, or free chappell donative, he may exempt the ſame from ordinarie juriſdiction, and then his chancellor ſhall viſit the ſame. Nay, if the king doe found the ſame without any ſpeciall exemption, the ordinarie is not, but the king's chancellor, to viſit the ſame. Now as the king may create donatives exempt from the viſitation of the ordinarie, ſo he may by his charter licence any ſubject to found ſuch a church or chappell, and to ordaine that it ſhall be donative, and not preſentable, and to be viſited by the founder, and not by the ordinarie. And thus beganne donatives in England, whereof common perſons were patrons.

F. N. B. 35 E. 42. A. B. 27 E. 3. 8. & 85. 8 Aſſ. 29. 8 E. 3. Aſſ. 150. 18 E. 3. Scire Fac. 11. 6 H. 7. 14. 16 E. 3. Brieſe 660. 21 E. 3. 60. Regiſtr. 40. Dyer. 10 Eli. f. 272. (F. N. B. 35. a.)

14 El. ca. 5. 2 H. 5. c. 1.

"*Ordinarie.*" *Ordinarius* is hee that hath ordinarie juriſdiction in cauſes eccleſiaſticall, immediate to the king and his courts of common law, for the better execution of juſtice, as the biſhop or any other that hath exempt and immediate juriſdiction in cauſes eccleſiaſticall. (9 Rep. 39. 4 Inſt. 338. Ant. 96. a.)

"*Ley temporel.*" Which conſiſteth of three parts, viz. Firſt, on the common law, expreſſed in our bookes of law, and judiciall records. Secondly, on ſtatutes contained in acts and records of parliament. And thirdly, on cuſtomes grounded upon reaſon, and uſed time out of minde; and the conſtruction and determination of theſe doe belong to the judges of the realme. (Ant. 110. 115. b.)

"*Ley ſpiritual, &c.*" That is, the eccleſiaſticall lawes allowed by the lawes of this realme, viz. which are not againſt the common law (whereof the king's prerogative is a principall part) nor againſt the ſtatutes and cuſtomes of the realme: and regularly according to ſuch eccleſiaſticall lawes, the ordinarie and other eccleſiaſticall judges doe proceed in cauſes within their conuſance. And this juriſdiction was ſo bounded by the ancient common lawes of the realme, and ſo declared by act of parliament. (12 Rep. 72.) The Statute of 25 H. 8. c. 19. 33 H. 6. 34. 32 H. 6. 28.

"*Admiſſion & inſtitution.*" In proprietie of ſpeech, admiſſion is, when the biſhop upon examination admitteth him to be able, and ſaith, *Admitto te habilem.* [*d*] Inſtitution is, when the biſhop ſaith, *Inſtituo te rectorem talis eccleſiæ cum curâ animarum, & accipe curam tuam & meam.* [*e*] But ſometimes in a more large ſenſe, *admiſſus* doth include *inſtitutus* alſo: *cujus præſentatus ſit admiſſus*, (*i. e.*) *inſtitutus.* And it is to obſerved, that inſtitution is a good plenartie againſt a common perſon (but not againſt the king, unleſſe he be inducted); and that is the cauſe that regularly plenartie ſhall be tried by the biſhop, becauſe the church is full by inſtitution, which is a ſpirituall act; but void or not void ſhall be tried by the common law. [*d*] Lib. 4. f. 75. & 79. Lib. 6. f. 49. Lib. 7. fo. 28. [*e*] W. 2. cap. 5. 13 E. 1. 22 H. 6. 27. 38 E. 3. 4.

At the common law, if an eſtranger had preſented his clerke, and he had beene admitted and inſtituted to a church, whereof any ſubject had beene lawfull patron, the patron had no other remedy to recover his advowſon, but a writ of right of advowſon, wherein the incumbent was not to be removed: and ſo it was at the common law, if an uſurpation had beene had upon an infant or Glanvill lib. 13. c. 18, 19, 20. Mirror cap. 5. §. 5. Bracton lib. 4. fo. 238. 240. 244. &c. 291. Flet. lib. 5. c. 11. 16. 17. Brit. f. 202, 223, 234.

6 E. 3. 28. 39. 52. 39 E. 3. 24. 43 E. 3. 25. 45 E. 3. Quar. imp. 139. 10 E. 2. Con. 22. 31 E. 1. Quar. imp. 186. (5 Rep. 57. 97. Lib. 6. 49, 50. b. 6 Rep. Green's caſe. 2 Cro. 385. F. N. B. 33. h.)

or ſeme covert, having an advowſon by diſcent, or upon tenant for life, &c. the infant, ſeme covert, and he in the reverſion were driven to their writ of right of advowſon; for at the common law, if the church were once full, the incumbent could not be removed, and plenartie generally was a good plea in a *quare impedit*, or aſſiſe of *darreine preſentment*: and the reaſon of this was, to the intent that the incumbent might quietly intend and applie himſelfe to his ſpirituall charge. And ſecondly, the law intended, that the biſhop that had cure of ſoules within his dioceſſe, would admit and inſtitute an able man for the diſcharge of his dutie and his owne; and that the biſhop would doe right to every patron within his dioceſſe. But at the common law, if any had uſurped upon the king, and his preſentee had beene admitted, inſtituted, and inducted, (for without induction the church had not beene full againſt the king) the king might have removed him by *quare impedit*, and beene reſtored to his preſentation; for therein he hath a prerogative, *quòd nullum tempus occurrit regi*; but he could not preſent, for the plenartie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meane time. [*] Neither did the king recover dammages in his *quare impedit* at the common law. But the ſaid ſtatute [a] hath altered the common law in the caſes aforeſaid; as namely, *Quoad hoc, quòd ſi pars rea accipiat de plenitudine eccleſiæ per ſuam propriam præſentationem, non propter illam plenitudinem remaneat loquela, dummodo breve infra tempus ſemeſtre impetretur, &c.* and alſo hath provided remedy in the other caſes, as by the ſaid act appeareth.

F. N. B. 36. k. 143. a. 35 E. 3. ca. 3. 13 R. 2. ca. 1. 4 H. 4. ca. 21. 1 H. fol. 19.

[*] Li. 6. fo. 51. Li. 7. fo. 19. 3 H. 6. Dam. 17. 34 H. 6. 28. 12 E. 3. Champerty 9. 18 E. 3. 2. Temps E. 1. Quar. imp. 181.

[a] W. 2. ca. 5. 13 E. 1.

[g] 45 E. 3. 35. 38 E. 3. 4. 25 E. 3. 47. 13 El. Dy. 292. Reg. 302, &c. 18 El. Dy. 348. 14 E. 4. 2. 7 H. 4. 32. 31 E. 1. Quar. imp. 185. W. 2. ub. ſup.

[g] And if the king doe preſent to a church, and his clerke is admitted and inſtituted, yet before induction the king may repeale and revoke his preſentation. But regularly no man can be put out of poſſeſſion of his advowſon but by admiſſion and inſtitution upon an uſurpation by a preſentation to the church, *cùm aliquis jus præſentandi non habens præſentaverit, &c.* and not by collation of the biſhop: [h] and therefore if the biſhop collate without title, and his clerke is inducted, this ſhall not put the rightfull patron out of poſſeſſion; for it ſhall be taken to be only proviſionally made for celebration of divine ſervice until the patron doe preſent; and therefore he is not driven to his *quare impedit*, or aſſiſe of *darreine preſentment*, in that caſe; but an uſurpation by collation ſhall take away the right of collation that is in another. (1)

[h] 17 E. 3. 64. (2 Inſt. 356. 6 Rep. 29. a. 50. a.)

It is to be obſerved, that an uſurpation upon a preſentation ſhall not only put out of poſſeſſion him that hath right of preſentation, but right of collation alſo. Therefore at this day the incumbent ſhall be removed in a *quare impedit*, or aſſiſe of *darreine preſentment*, if there be not a plenartie by ſix moneths before the *teſte* of the writ; but then the incumbent muſt be named in the writ, or elſe he ſhall never be removed: yet at the common law, if the ordinary refuſed to admit and inſtitute the clerke of the patron, or when any diſturbed him to preſent, ſo as he could not preferre his clerke, he might have his *quare impedit*, or aſſiſe *de darreine preſentment*; and if the church were not full, have a writ to the biſhop to admit his clerke: but ſo odious was ſymonie in the eye of the common law, that before the ſtatute of *W.* 2. he recovered no dammages.

(3 Rep. 30. a. 50. a.)

9 H. 6. 32 & 56. 19 H. 6. 68.

(7 Rep. 27. Cro. Car. 74. Doct. & Stud. 31. b. Lib. 6. 51. Ant. 17. b.)

At

(1) V. ſtat. 7 Ann. c. 18.

At the common law, if hanging the *quare impedit* againſt the ordinary for refuſing of his clerke, and before the church were full, the patron brought a *quare impedit* againſt the biſhop, and hanging the ſuit, the biſhop admit and inſtitute a clerke at the preſentation of another, in this caſe if judgement be given for the patron againſt the biſhop, the patron ſhall have a writ to the biſhop, and remove the incumbent that came in *pendente lite* by uſurpation, for *pendente lite nihil innovetur*, and therefore at the common law it was good policie to bring the *quare impedit* againſt the biſhop as ſpeedily as might be. And it is to be obſerved, that albeit the clerke that comes in *pendente lite*, by uſurpation, ſhall be removed; yet if the rightfull patron, being a ſtranger to the writ, preſent *pendente lite*, and his clerke is admitted and inſtituted, he ſhall not be removed; for elſe by the bringing of ſuch *quare impedit* againſt the ordinary, the rightfull patron might be defeated of his preſentation: and therefore ever after the ſtatute of *Weſtm.* 2. amongſt other things it was enquired *ex officio*, if the church were full, and of whoſe preſentation, &c. and if the plaintife ſhould have a writ to the biſhop, and his clerke admitted, (as in moſt caſes hee ought) yet may the rightfull incumbent have his remedie by law.

(10 Rep. 53. 5 Rep. 104. 6 Rep. 51. Hob. 201. 2 Cro. 93.) 18 E. 2. Preſentment 20. 50 E. 3. Encumbent 10. 21 H. 7. 8. a. & b. 9 Eliz. Dyer 260. F. N. B. 32. 14 H. 8. 31.

19 E. 2. Dar. Pref. 21. 10 E. 3. 17. 9 H. 6. 31.

And as it was good policie (as hath beene ſaid) to bring a *quare impedit* as ſpeedily as might be againſt the biſhop, ſo it is good policie at this day to name the biſhop in the *quare impedit*, for then he ſhall not preſent by laps. But ſeeing the biſhop ſhall not preſent by laps becauſe he is named in the writ, what then, after that the time be devolved to the metropolitan, ſhall not he preſent by laps, becauſe he is not named? To this it is anſwered, that he ſhal not in that caſe preſent by laps; for the metropolitan ſhal never preſent or collate by laps after ſix moneths, but when the immediate ordinary might have collated by laps within the ſix moneths, and had ſurceaſed his time. And ſo it is if the time be devolved to the king for the firſt ſtep or beginning faileth; and in humane things, *Quod non habet principium, non habet finem.* And all theſe points were reſolved [*] in a writ of error brought by *Richard* biſhop of London and *John Lancaſter* againſt *Anthony Lowe* upon a judgement given againſt them in a *quare impedit* in the common-place for the church of Winbiſhe. But now let us heare what our author will ſay unto us.

[345. a.]

30 E. 3. tit. Quar. imp. Stath. 46 E. 3. 15. 9 H. 6. 32. 56. 19 H. 6. 68. L. 5 E. 4. 115. 9 E. 4. 30.

11 H. 4. 80. (Hob. 154.)

[*] Mich. 3. Jacobi. (6 Rep. 48. b. 2 Cro. 92.)

Sect. 649.

ITEM, ſi tenant en taile ad iſſue et ſoit diſſeiſie, et puis il releſſa per ſon fait tout ſon droit a le diſſeiſor: en ceſt caſe nul droit de taile poit eſtre en le tenant en taile, pur ceo que il avoit releas tout ſon droit. Et nul droit poit eſtre en l'iſſue en le taile durant le vie ſon pere. Et tiel droit del enheritance en le taile n'eſt pas tout ouſterment

ALSO, if tenant in tayle hath iſſue and is diſſeiſed, and after he releaſeth by his deed all his right to the diſſeiſor: in this caſe no right of taile can be in the tenant in taile, becauſe hee hath releaſed all his right. And no right can be in the iſſue in taile during the life of his father. And ſuch right of the inheritance

ouſterment expire per force de tiel releas, &c. Ergo, *il covient que tiel droit demurt en abeiance* *, ut ſupra, *durant la vie le tenant en taile que releſſa, &c. et apres ſon deceaſe donque eſt tiel droit maintenant en ſon iſſue en fait, &c.*

inheritance in the taile is not altogether expired by force of ſuch releaſe, &c. *Ergo*, it muſt needs be that ſuch right remaine in abeiance, *ut ſupra*, during the life of tenant in taile that releaſeth, &c. and after his deceaſe ſuch right preſently is in his iſſue in deed, &c.

Sect. 650.

EN meſme le maner eſt, lou tenant en taile granta tout ſon eſtate a un auter; en ceſt cas le grauntee n'ad eſtate forſque pur terme de vie del tenant en le taile, et le reverſion de le taile n'eſt pas en le tenant in taile, pur ceo que il avoit graunt tout ſon eſtate et ſon droit, &c. Et ſi le tenant a que le graunt fuit fait fiſt waſt, le tenant en le taile ne unque avera briefe de waſt, pur ceo que nul reverſion eſt en luy. Mes le reverſion et le enheritance de le taile, durant le vie le tenant en le taile, eſt en abeiance, ceſtaſcavoir, tantſolement en le remembrance, conſideration, et intelligence de la ley †.

IN the ſame manner it is, where tenant in taile grant all his eſtate to another; in this caſe the grantee hath no eſtate but for terme of life of the tenant in taile, and the reverſion of the taile is not in the tenant in taile, becauſe he hath granted all his eſtate and his right, &c. And if the tenant to whom the grant was made make waſte, the tenant in taile ſhall not have a writ of waſte, for that no reverſion is in him. But the reverſion and inheritance of the taile, during the life of the tenant in taile, is in abeiance, that is to ſay, only in the remembrance, conſideration, and intelligence of the law.

(Hob. 338.)

Pl. Com. fol. 562, 563. in Walſingham's caſe. 14 E. 3. Diſcont. 5. (Cro. Car. 427. 8, 9. Ant. 217. a. Dyer 71. a.) 19 H. 6. 60. 29 Aſſ. p. Walſingham's caſe, ubi ſupra.

LITTLETON having declared where a fee is in abeyance, and where a freehold and fee is in abeyance by act in law, and where a fee that is in abeyance may be charged; here he putteth two caſes where a right of an eſtate taile may be in abeyance by the act of the partie, which are ſo cleare and evident, as there needs no further proofe or argument, than *Littleton* hath juſtly and artificially made, albeit ſome objections of no weight have beene made againſt it. If tenant in taile of lands holden of the king be attainted of felonie, and the king after office ſeiſeth the ſame, the eſtate taile is in abeyance, there ſaid to be in ſuſpence.

(Ant. 263. b. 299. b. 331. a. 342. b.)

Vide Sect. 65. 524, 525, 526. 44 E. 3. 19. 14 Aſſ. 28. 43 Aſſ. 8. 5 H. 7. 30. 44 Aſſ. 28. 44 E. 3. 10.

"*Grant ſon eſtate, concedit ſtatum ſuum.*" State or eſtate ſignifieth ſuch inheritance, freehold terme for yeares, tenancie by ſtatute merchant, ſtaple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his eſtate, &c. as much as he can grant ſhall paſſe, as here by *Littleton*'s caſe appeareth. Tenant for life, the remainder in taile, the remainder to the right heires of tenant for life, tenant for life grant *totum ſtatum ſuum* to a man and his heires, both eſtates doe paſſe.

"*Right*,"

* &c. added L. and M. and Roh. † &c. added L. and M. and Roh.

"*Right,*" *Jus, ſive rectum,* (which *Littleton* often uſeth) ſignifieth properly, and ſpecially in writs and pleadings, when an eſtate is turned to a right, as by diſcontinuance, diſſeiſin, &c. where it ſhall bee ſaid, *quòd jus deſcendit et non terra.* But (Right) doth alſo include the eſtate *in eſſe* in conveyances; and therefore [345. b.] if tenant in fee ſimple make a leaſe for yeares, and releaſe all his right in the land to the leſſee and his heires, the whole eſtate in fee ſimple paſſeth. (Plo. 484.) 20 H. 6. 9. Vide Sect. 465. Pl. Com. 484. Lib. 8. fol. 153. Altham's caſe. 39 H. 6. 38.

And ſo commonly in fines, the right of the land paſſeth the ſtate of the land; as *A. concedit tenementa prædicta eſſe jus ipſius B.* &c. And the ſtatute [a] ſaith, *jus ſuum defendere,* (which is) *ſtatum ſuum.* And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus poſſidendi.* (4 Ric. 429.) [a] W. 2. cap. 3. Pl. Com. 484 & 487. b.

Title, properly, (as ſome ſay) is, when a man hath a lawfull cauſe of entry into lands whereof another is ſeiſed, for the which hee can have no action, as title of condition, title of mortmaine, &c. But legally this word (Title) includeth a right alſo, as you ſhall perceive in many places in *Littleton*: and title is the more generall word; for every right is a title, but every title is not ſuch a right for which an action lieth; and therefore *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt,* and ſignifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c. And when the plaintife in aſſize maketh himſelfe a title, the tenant may ſay, *Veniat aſſisa ſuper titulum;* which is as much to ſay, as upon the title which the plaintife hath made by that particular conveyance. *Et dicitur titulus à tuendo,* becauſe by it he holdeth and defendeth his land; and as by a releaſe of a right a title is releaſed, ſo by releaſe of a title a right is releaſed alſo. See more hereof in *Fitzherbert* and *Brookes'* Abridgements in the title of *Title.* Vid. Sect. 429. 659. &c. (Poſt. 347. b.) 6 H. 7. 8. a. Altham's caſe ubi ſupra.

"*Intereſt.*" *Intereſſe* is vulgarly taken for a terme or chattle reall, and more particularly for a future tearme; in which caſe it is ſaid in pleading, that he is poſſeſſed *de intereſſe termini.* But *ex vi termini,* in legall underſtanding, it extendeth to eſtates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly ſaid to have an intereſt in them: and by the grant of *totum intereſſe ſuum* in ſuch lands, as well reverſions as poſſeſſions in fee ſimple ſhall paſſe. And all theſe words ſingularly ſpoken are *nomina collectiva;* for by the grant of *totum ſtatum ſuum* in lands, all his eſtates therein paſſe. *Et ſic de cæteris.* Pl. Com. fol. 374. in ſeigniot Zouche's caſe; & fol. 87 & 448 in Nichol's caſe. 23 H. 8. taile Br. 32. 35 H. 8. Grant. Br. 150. Vide 16 Eliz. Dier 325. b. Titulum.

"*Ne unques avera briefe de waſte, &c.*" So it is if tenant for life be, the remainder in taile, and he in the remainder releaſe to the tenant for life, all his right and ſtate in the land. Hereby it is ſaid in our bookes, that the eſtate of the leſſee is not inlarged, but the releaſe ſerveth to this purpoſe, to put the eſtate taile into abeyance, ſo as after that he in the remainder cannot have an action of waſte; yet in that caſe (ſaving reformation) the leſſee for life hath an eſtate for the life of tenant in taile expectant upon his owne life. But if tenant in fee releaſe to his tenant for life all his right, yet he ſhall have an action of waſte. And if tenant in taile make a leaſe for his owne life he ſhall have an action of waſte. 43 Aſſ. p. 13. 41 E. 3. tit. Waſte 83. 11 H. 4. 67. 13 H. 7. 10. Pl. Com. 482. per Dier. 27 H. 8. 20. 42 E. 3. 23. F. N. B. 60 H. 41 E. 3. Waſte 83. 42 E. 3. 18.

(Ant. 342. a. F. N. B. 194.)

Sect. 651.

[346. a.]

ITEM, ſi un eveſque alien terres que ſont parcel de ſon eveſquery et devie, ceo eſt un diſcontinuance a ſon ſucceſſor, pur ceo que il ne poit enter, mes eſt mis a ſon briefe de ingreſſu ſine aſſenſu capituli.

ALSO, if a biſhop alien lands which are parcell of his biſhopricke and die, this is a diſcontinuance to his ſucceſſor, becauſe he cannot enter, but is put to his writ of *de ingreſſu ſine aſſenſu capituli*.

OF this ſufficient hath beene ſaid (how the law ſtandeth at this day) before in this Chapter.

(Ant. 342. a.)

Sect. 652.

ITEM, ſi un dean alien terres * *queux il ad en droit de luy et ſon chapiter, et moruſt, ſon ſucceſſor* † *poit enter.* ‡ *Mes ſi le deane eſt ſole ſeiſie come en droit ſon deanry, donque ſon alienation eſt diſcontinuance a ſon ſucceſſor, come eſt dit adevant.*

ALSO, if a deane alien lands which he hath in right of him and his chapter, and dieth, his ſucceſſor may enter. But if the deane bee ſole ſeiſed as in right of his deanry, then his alienation is a diſcontinuance to his ſucceſſor, as is ſaid before.

22 E. 4. tit. Feoffment & Faits, 29.
21 E. 4. 85, 86.

HEREOF alſo that which was neceſſary is before ſaid in this Chapter, and *Littleton*'s owne words are plaine and evident.

Sect. 653.

ITEM, peradventure aſcuns voilont arguer et dire, que ſi un abbe et ſon covent ſont ſeiſies en lour demeſne come de fee de certaine terres a eux et a lour ſucceſſors, &c. et l'abbe ſans aſſent de ſon covent alien meſmes les terres a un auter et devie, ceo eſt un diſcontinuance a ſon ſucceſſor, &c.

ALSO, peradventure ſome will argue and ſay, that if an abbot and his covent bee ſeiſed in their demeſne as of fee of certaine lands to them and to their ſucceſſors, &c. and the abbot without the aſſent of his covent alien the ſame lands to another and die, this is a diſcontinuance to his ſucceſſor, &c.

* *queux il ad en droit de luy et ſon chapter,——parcel de ſon deanrie,* L. and M. and Roh.

† *ne* added L. and M. and Roh.

‡ *Mes poit aver briefe de ingreſſu ſine aſſenſu epiſcopi et capituli, &c.* added L. and M. and Roh. and MSS.

Sect. 654.

*PER meſme reaſon ils voilent dire, que lou un dean * en chapter ſont ſeiſies de certain terre a eux et a lour ſucceſſors, ſi le deane alien meſme la*
[346. b.] *terre, &c. ceo ſerroit un diſcontinuance a ſon ſucceſſor, iſſint que ſon ſucceſſor ne poit enter, &c. A ceo poit eſtre reſpondue, que il y ad grand diverſitie perenter les † deux caſes.*

BY the ſame reaſon they will ſay that where a deane and chapter are ſeiſed of certaine lands to them and their ſucceſſors, if the deane alien the ſame lands, &c. this ſhall be a diſcontinuance to his ſucceſſor, ſo as his ſucceſſor cannot enter, &c. To this it may be anſwered, that there is a great diverſitie betweene theſe two caſes.

Sect. 655. (Ant. 342. a.)

CAR quant un abbe et le covent ſont ſeiſies ‡, uncore s'ils ſont diſſeiſie, l'abbe avera aſſiſe en ſon noſme demeſne, ſans noſmer le covent, ‡ &c. Et ſi aſcun voile ſuer præcipe quòd reddat, &c. *de meſmes les terres quant ils fueront en le maine l'abbe et covent, il covient que tiel action real ſoit ſue envers l'abbe ſolement ſans noſmer la covent ‖, pur ceo que touts ſont morts perſons en la ley, forſque l'abbe que eſt le ſoveraigne, &c. Et ceo eſt per cauſe del ſoveraigntie §; car auterment il ſerroit forſque come ¶ un de les auters moignes de le covent, &c.*

FOR when an abbot and the covent are ſeiſed, yet if they bee diſſeiſed, the abbot ſhall have an aſſiſe in his owne name, without naming the covent, &c. And if any will ſue a *præcipe quòd reddat, &c.* of the ſame lands when they were in the hands of the abbot and covent, it behoveth that ſuch action reall be ſued againſt the abbot only without naming the covent, becauſe they are all dead perſons in law, but the abbot who is the ſoveraigne, &c. And this is by reaſon of the ſoveraignty; for otherwiſe he ſhould bee but as one of the other monkes of the covent, &c.

Sect. 656.

MES un dean et le chapter ne ſont mort perſons en la ley, &c. car cheſcun de eux poit aver action per ſoy en divers caſes. Et de tiels terres ou tenements que le deane et chapter

BUT deane and chapter are not dead perſons in law, &c. for every of them may have an action by himſelfe in divers caſes. And of ſuch lands or tenements as the deane and chapter

* *en—et le*, L. and M. and Roh.
† *dites* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
‖ *&c* added L. and M. and Roh.
§ *&c.* not in L. and M. nor Roh.
¶ *un* not in L. and M. nor Roh.

*hapter ont en common, &c. s'ils ſoient diſſeiſies, le deane et chapter averont n aſſiſe, et nemy le deane ſole, * &c. Et ſi auter voile aver action real de tiels terres ou tenements envers le deane, &c. il covient de ſuer envers le deane et chapter, et nemy envers le deane ſole, &c. et iſſint il appiert grand diverſitie perenter les deux caſes, &c.*

chapter have in common, &c. if they bee diſſeiſed, the deane and chapter ſhall have an aſſiſe, and not the deane alone, &c. And if another will have an action reall for ſuch lands or tenements againſt the deane, &c. he muſt ſue againſt the deane and chapter, and not againſt the deane alone, &c. and ſo there appeareth a great diverſitie betweene the two caſes, &c. [347. a.]

(10 Rep. 132. F. N. B. 2. e. 131. e. 192. b.)

THESE are apparent, and need no explanation. Saving in the 655 Section mention is made of the *præcipe quòd reddat*, which in this place is intended of a reall action whereby land is demanded, and is ſo called of the words in every ſuch writ.

Vid. Sect. 200. 8 E. 3. 27. 11 H. 4. 84. 21 E. 4. 86. 11 H. 7. 12.

And the reaſon of this diverſitie betweene the caſe of the abbot and covent, and deane and chapter is, for that (as hath beene ſaid) the monkes are regular, and civilly dead, and the chapter are ſecular, and perſons able and capable in law. But by the policie of law the abbot himſelfe (here termed the ſoveraigne) albeit he be a monke and regular, yet hath he capacitie and abilitie to ſue and be ſued, to enfeoffe, give, demiſe, and leaſe to others, and to purchaſe and take from others; for otherwiſe they which right have ſhould not have their lawfull remedie, nor the houſe remedie againſt any other that did them wrong: neither could the houſe without ſuch capacitie and abilitie ſtand. And the covent have no other abilitie or capacitie, but only to aſſent to eſtates made to the abbot, and to eſtates made by him, which for neceſſitie's ſake, though they be civilly dead, they may doe.

(Ante 342. a.) (Plo. 22. b.)

Sect. 657.

ITEM, ſi le maſter d'un hoſpitall diſcontinue certaine terre de ſon hoſpitall, ſon ſucceſſor ne poit enter, mes eſt mis a ſon briefe de ingreſſu ſine aſſenſu confratrum et † conſororum, &c. *Et touts tiels briefes pleinment appearont en le Regiſter, &c.*

ALSO, if the maſter of an hoſpitall diſcontinue certaine land of his hoſpitall, his ſucceſſor cannot enter, but is put to his writ of *de ingreſſu ſine aſſenſu confratrum et conſororum, &c.* And all ſuch writs fully appeare in the Regiſter, &c.

THIS muſt alſo be underſtood where the maſter of the hoſpitall hath ſole and diſtinct poſſeſſions, and not where he and his brethren are ſeiſed as a body politike aggregate of many. And here *Littleton* (as divers time before) doth cite the Regiſter.

* *&c.* not in L. and M. nor Roh. † *conſororum—ſororum*, L. and M. and Roh.

Sect. 658. (1 Roll. Abr. 634.)

ITEM, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter en le taile, ſavant le reverſion al leſſor, et puis celuy en le remainder diſſeiſiſt le tenant a terme de vie, et fait un feoffment a un auter en fee, et puis moruſt ſans iſſue, et le tenant a terme de vie moruſt; il ſemble en ceſt cas, que celuy en la reverſion bien puit enter ſur le feoffee, pur ceo que celuy en le remainder que fiſt le feoffment, ne fuit unque ſeiſie en le taile per force de meſme le remainder, &c.

ALSO, if land be lett to a man for terme of his life, the remainder to another in taile, ſaving the reverſion to the leſſor, and after he in the remainder diſſeiſeth the tenant for terme of life, and maketh a feoffment to another in fee, and after dyeth without iſſue, and the tenant for life dyeth; it ſeemeth in this caſe, that hee in the reverſion may well enter upon the feoffee, becauſe he in the remainder which made the feoffment, was never ſeiſed in taile by force of the ſame remainder, &c.

[347. b.] HERE it appeareth, that albeit the feoffor hath an eſtate taile in him expectant upon an eſtate for life, yet his feoffement worketh no diſcontinuance. Wherein *Littleton* doth adde a limitation to that which in this Chapter he had generally ſaid, viz. That an eſtate taile cannot be diſcontinued, but where he that maketh the diſcontinuance was once ſeiſed by force of the taile; which is to be underſtood, when he is ſeiſed of the freehold and inheritance of the eſtate in taile, and not where he is ſeiſed of a remainder or a reverſion expectant upon a freehold; which freehold (as often hath beene ſaid) is ever much reſpected in law.

Vid. Sect. 637. 592. 596, 597. 601. 640, 641. (10 Rep. 35. 1 Roll. Abr. 634.)

Chap. 12. Of Remitter. Sect. 659.

*Remitter eſt un antient terme en la ley, et eſt lou home ad deux titles a terres ou tenements, ſcilicet, un pluis antient title, et un auter title pluis darrein; et s'il vient a la terre per le pluis darreine title, uncore la ley luy adjudgera eins per force del pluis eigne title, pur ceo que le pluis eigne title eſt le pluis ſure title, et pluis digne title. Et donque quant home eſt adjudge eins per force de ſon eigne title, ceo eſt a luy dit un remitter, pur ceo que la ley luy mitter d'eſtre eins en la terre per le pluis eigne * et ſure title. Sicome tenant en le taile diſcontinua la taile, et puis il diſſeiſiſt ſon diſcontinuee, et iſſint mourſt ſeiſie, per que les tenements diſcendont a ſon iſſue ou coſine, inheritable per force de le taile; en teſt caſe, ceo eſt a luy a que les tenements diſcendont, que ad droit per force de le taile un remitter a le taile, pur ceo que le ley luy mitte et adjudge d'eſtre eins per force de le taile, que eſt ſon eigne title: car s'il ſerroit eins per force de le diſcent, donques le diſcontinuee puiſſoit aver briefe de* entre ſur diſſeiſin *en le* per *envers luy, et recoveroit les tenements et ſes dammages, † &c. Mes entant que il eſt eins en ſon remitter per force de le taile, le title et le intereſt le diſcontinuee eſt tout ouſterment anient et deſeat, &c.*

REMITTER is an antient terme in the law, and is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, becauſe the elder title is the more ſure and more worthie title. And then when a man is adjudged in by force of his elder title, this is ſayd a remitter in him, for that the law doth admit him to be in the land by the elder and ſurer title. As if tenaunt in taile diſcontinue the taile, and after hee diſſeiſeth his diſcontinuee, and ſo dieth ſeiſed, whereby the tenements deſcend to his iſſue or coſine inheritable by force of the taile; in this caſe, this is to him to whom the tenements deſcend, who hath right by force of the tayle a remitter to the tayle, becauſe the law ſhall put and adjudge him to bee in by force of the tayle, which is his elder title: for if hee ſhould bee in by force of the diſcent, then the diſcontinuee might have a writ of entrie *ſur diſſeiſin* in the *per* againſt him, and ſhould recover the tenements and his dammages, &c. But inaſmuch as he is in his remitter by force of the taile, the title and intereſt of the diſcontinuee is quite taken away and defeated, &c. (1)

HERE our author having next before treated of a Diſcontinuance, very aptly beginneth this Chapter with a deſcription of a Remitter.

(2 Roll. Abr. 422.) "*Remitter eſt un antient terme en la ley,*" and is derived of the Latine verbe *remittere*, which hath two ſignifications; either, to reſtore and ſet up againe, or to ceaſe. Therefore a remitter is an operation in law upon the meeting of an ancient right remediable, and a latter ſtate in one perſon where there is no follie in him, whereby

* *et ſure* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

(1) [See Note 300.]

whereby the ancient right is reſtored and ſet up againe, and the new defeaſible eſtate ceaſed and vaniſhed away. And the reaſon hereof is, for that the law preferreth a ſure and conſtant right, though it be little, before a great eſtate by wrong and defeaſible; and therefore the firſt and more ancient is the moſt ſure and more worthy title; *Quod prius eſt, verius eſt, & quod prius eſt tempore, potius eſt jure:* [a] therefore many bookes in ſtead of remitter ſay, that he is *en ſon primer eſtate*, or *en ſon melior droit*, or *en ſon melior eſtate*, or the like. (1)

[a] 25 Aſſ. pl. 4. 35 Aſſ. pl. 11. 26 E. 3. 69. 11 H. 4. 50. a. 41 E. 3. 17. b. Et tit. Remit. 11. 6 E. 3. 17.

"*Lou home ad deux titles.*" Here this word (Titles) is taken in the largeſt ſenſe, including rights: for being properly taken, [b] as in caſe of a condition, mortmaine, aſſent to a raviſher, and the like, there is no remitter wrought unto them, becauſe theſe are but bare titles of entrie, for the which no action is given; but a remitter muſt be to a preeedent right: and *Littleton* in this Chapter putteth all his caſes onely of remitters, to rights remediable. (8 Rep. 153.) [b] Vide Sect. 429 & 659, &c. 34 H. 8. tit. Remitter Br. 50. 44 E. 3. Attaint. 22. 38 Aſſ. pl. 7. (Plo. 484. Ant. 345.) (2 Roll. Abr. 421.)

[348. a.]

"*Et un auter title pluis durreine, &c.*" Here is to be obſerved, that an eſtate muſt worke a remitter to an ancient right; for albeit two rights doe deſcend, there can be no remitter, becauſe one right cannot worke a remitter to another: for regularly to every remitter there be two incidents, viz. an ancient right and a defeaſible eſtate of freehold comming together. 19 H. 6. 59. 73. 45 tit. Entre Cong. 3. Pl. Com. 246. a. (3 Rep. 1.)

"*Le pluis eigne title eſt le pluis ſure title, et pluis digne title.*" So as the eldeſt title is worthily (as hath beene ſaid) preferred, becauſe it is the more ſure and more worthy.

"*Sicome tenant en taile diſcontinue le taile, &c.*" Here our author, according to his accuſtomed manner, to illuſtrate his deſcription putteth an example of a remitter, where the law preferreth the ancient eſtate by right, before a new eſtate defeaſible. And this remitter is wrought by an eſtate caſt upon the iſſue in taile by diſcent, which is an act in law, and the diſcent of the land in poſſeſſion, and the right of eſtate taile deſcend together. 19 H. 6. 61, 62.

"*Eſt tout ouſterment anient et defeat, &c.*" Here be two things implied and to be underſtood: Firſt, that this remitter is wrought in this caſe by operation of law upon the freehold in law deſcended without any entrie. Secondly, that the law ſo favoureth a remitter (being a reſtoring to right), that if the diſcontinuee be an infant or a feme covert, and tenant in taile after a diſcontinuance diſſeiſe them and die ſeiſed, the iſſue ſhall be remitted without any reſpect of the privilege of infancie or coverture; and therefore our author ſaid, *le title et intereſt le diſcontinuee eſt tout ouſterment anient et defeat.* (Poſt. 390. a. Ant. 246. a. Poſt. 357. a.) 11 E. 4. 1.

"*Donques le diſcontinuee, &c.*" Here is a reaſon added in this particular caſe, that fitteth not other caſes of remitter; for in this caſe 11 E. 3. 3. tit. Aſſ. 85. 4 E. 4. 35. 11 R. 2.

(1) [See Note 299.]

Bar. 242. 30 E. 3. 8. 6 E. 3. 7. 19 H. 6. 63. 24 E. 3. 70. 14 H. 4. 27. 10 H. 7. 11. F. N. B. Meſne & Waſt.

caſe and many other, the law that abhorreth ſuits of vexation doth avoid circuitie of action; for the rule is, *Circuitus eſt evitandus.*

Sect. 660.

*ITEM, ſi le tenant en tayle enfeoffa ſon fits en fee, ou ſon coſine inheritable per force de le taile, le quel fits ou coſin al temps de feoffment eſt deins age, et puis le tenant en le taile devia, et celuy a que le feoffment fuit fait eſt ſon heire per force de le taile; ceo eſt un remitter al heire en le taile a que le feoffment fuit fait. Car coment que durant la vie le tenant en le taile que fiſt le feoffment, tiel heire ſerra adjudge cins per force de le feoffment, uncore apres la mort le tenant en le tayle, l'heire ſerra adjudge eins per force de le taile, et nemy per force de le feoffment. * Car coment que tiel heire fuit de pleine age al temps de le mort de le tenaunt en le taile que fiſt le feoffment, ceo ne fait aſcun matter, ſi l'heire fuit deins age al temps del feoffment fait a luy. Et ſi tiel heire eſteant deins age al temps de tiel feoffement, vient al pleine age, vivant le tenant en le taile que fiſt le feoffment, et iſſint eſteant de pleine age, il charge per ſon fait meſme la terre ove un common de paſture, ou ove un rent charge, et puis le tenant en le taile moruſt; ore il ſemble que le terre eſt diſcharge del common, et de le rent, pur ceo que le heire eſt eins de auter eſtate en la terre que il fuit al temps de le charge fait, entant que il eſt en ſon remitter per force de le tayle, et iſſint l'eſtate que il avoit al temps de le charge, eſt ouſterment defeat, † &c.*

ALSO, if tenant in tayle infeoffe his ſonne in fee, or his coſine inheritable by force of the taile, which ſonne or coſine at the time of the feoffment is within age, and after the tenant in taile dieth, and hee to whom the feoffment was made is his heire by force of the taile; this is a remitter to the heire in taile to whom the feoffement was made. For albeit that during the life of the tenant in tayle who made the feoffement, ſuch heire ſhall bee adjudged in by force of the feoffement, yet after the death of tenant in taile, the heire ſhall be adjudged in by force of the taile, and not by force of the feoffment. For altho' ſuch heire were of full age at the time of the death of the tenant in taile who made the feoffment, this makes no matter, if the heire were within age at the time of the feoffement made unto him. And if ſuch heire beeing within age at the time of ſuch feoffment, commeth to full age, living the tenant in tayle that made the feoffement, and ſo being of full age he charges by his deed the ſame land with a common of paſture, or with a rent charge, and after the tenant in tayle dyeth; now it ſeemeth that the land is diſcharged of the common, and of the rent, for that the heire is in of another eſtate in the land than he was at the time of the charge made, in as much as hee is in his remitter by force of the tayle, and ſo the eſtate which hee had at the time of the charge, is utterly defeated, &c. (1)

* *Car* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

(1) [See Note 301.]

OUR

[348. b.] OUR author having put one example where both the rights descend together, now puts another example, where the issue in taile claimeth by purchase in the life of tenant in taile, and the ancient right descendeth after to the same issue. Temps E. 1. Remit. 13. 11 E. 3. Age 5. 38 E. 3. 24. 40 E. 3. 43. 21 E. 4. 19.

"*Car coment que tiel heire fuit de pleine age al temps del mort, &c.*" The reason is, because no follie can be adjudged in the infant at the time of the acceptance of the feoffement. Therefore the law respecteth the time of the feoffement, and not the time of the death: and albeit he might have waived the estate which he had by the feoffement at his full age, yet here it appeareth, that the right of the estate taile descending to him either within age, or of full age, shall work a remitter in him; for that the waiver of the state should have beene to his losse and prejudice.

Since *Littleton* wrote, and after the statute of 27 *H.* 8. *cap.* 10. if tenant in taile make a feoffement in fee to the use of his issue being within age, and his heires, and dieth, and the right of the estate taile descend to the issue being within age; yet he is not remitted, because the statute executeth the possession in such plite, manner and forme, as the use was limited: *Et sic de similibus*, so as there is a great change of remitters since *Littleton* wrote (1). 27 H. 8. c. 10. of Uses. 35 H. 8. Dy. 54. b. 6 E. 6. ib. 77. 1 & 2 P. & M. 116. 2 & 2 P. & M. 129. 191. 28 H. 8. 23. b.

Pl. Com. Amy Townshend's case, fol. 111. 34 H. 8. tit. Remit. Br. 49. (Dyer 106 Sid. 63. 1 Leo. 91. Hob. 255. 298.)

But if the issue in taile in that case waive the possession, and bring a formedon in the discender, and recover against the feoffees, he shall thereby bee remitted to the estate taile; otherwise the lands may be so incumbred, as the issue in taile should be at a great inconvenience: but if no formedon be brought, if that issue dieth, his issue shall be remitted; because a state in fee simple at the common law descendeth unto him. Pl. Com. ub. sup. (2 Roll. Abr. 419. 421. 1 Roll. Rep. 260.)

[349. a.] "*Eſteant de pleine age, il charge per ſon fait, &c.*" The reason is, because the grantor had not any right of the estate in taile in him at the time of the grant, but only the estate in fee simple gained by the feoffment, which (as *Littleton* here saith) is wholly defeated. And the state of the land out of which the rent issued, being defeated, the rent is defeated also. (2 Roll. Abr. 419. 421. 3 Rep. 5. b. Hob. 45.)

But if tenant in taile make a lease for life whereby he gaineth a new reversion in fee, so long as tenant for life liveth, and he granteth a rent-charge out of the reversion, and after tenant for life dieth, whereby the grantor becommeth tenant in taile againe, and the reversion in fee defeated; yet because the grantor had a right of the entaile in him, cloathed with a defeasible fee simple, the rent-charge remaineth good against him, but not against his issue; which diversitie is worthy of observation, for it openeth the reason of many cases. 11 H. 7. 21. Edriche's case. (Mo. 319. 1 Rep. 148. Ant. 278. a.)

If the heire apparent of the disseisee disseise the disseisor, and grant a rent-charge, and then the disseisee dieth, the grantor shall hold it discharged; for there a new writ of entrie doth descend unto him, and therefore he is remitted. (2 Roll. Abr. 422.)

So

(1) The effect of this statute on the doctrine of Remitter is very fully explained in Duncombe v. Wingfield, Hob. 254. See 2 Leo. 222. Sid. 63. Dyer, 351.

So if the father diſſeiſe the grandfather, and granteth a rent-charge, and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth the ſonne is remitted, and he ſhall avoid the charge. So as where our author putteth his example of a fee taile, it holdeth alſo in caſe of a fee ſimple.

"*Un common de paſture, ou un rent charge, &c.*" Here *Littleton* putteth his caſe of things granted out of the land. But what if the iſſue at full age by deed indented or deed poll make a leaſe for yeares of the land, and after by the death of tenant in taile he is remitted, whether ſhall he avoid the leaſe or no? And it is holden he ſhall not, becauſe it is made of the land it ſelfe, and the land is become by the leaſe in another plight than it is in the caſe of a grant of a rent-charge, which I gather out of our author's owne words in another place.

33 H. 8. Dier 51. b.

Vide Sect. 289.

"*La terre eſt diſcharge del rent, &c.*" *Littleton* doth adde theſe words materially, becauſe the whole grant is not thereby avoided, but the land diſcharged of the rent-charge; for the grantee ſhall have notwithſtanding a writ of annuitie, and charge the perſon of the grantor.

Ll. 2. f. 36. b. Ward's caſe.

Sect. 661.

ITEM, un principall cauſe pur que tiel heire en les caſes avantdits, et auters caſes ſemblables, ſerra dit en ſon remitter, eſt pur ceo que il n'y ad aſcun perſon envers que il poet ſuer ſon briefe de formedon. Car envers luy meſme il ne poit ſuer, et il ne poit ſuer envers nul auter, car nul auter eſt tenant del franktenement; et pur cel cauſe la ley luy adjudge eins en ſon remitter, ſcilicet, en tiel plite, ſicome il avoit loialment recover meſme la terre envers un auter, &c.

ALSO, a principall cauſe why ſuch heire in the caſes aforeſaid, and other like caſes, ſhall bee ſaid in his remitter, is for that there is not any perſon againſt whom he may ſue his writ of *formedon*. For againſt himſelfe he cannot ſue, and hee cannot ſue againſt any other, for none other is tenant of the freehold; and for this cauſe the law doth adjudge him in his remitter, *ſcilicet*, in ſuch plite, as if hee had lawfully recovered the ſame land againſt another, &c.

"*UN principall cauſe pur que, &c.*" And of this opinion is [d] *Littleton* in our bookes.

[d] 12 E. 4. 20. 41 E. 3. 18. 21 H. 4. 60.

"*Il n'ad aſcun perſon envers que, &c. ſicome il avoit loialment recover meſme la terre vers un auter, &c.*" Here it is to be underſtood, that regularly a man ſhall not be remitted to a right remedileſſe, for the which he can have no action; for *Littleton* here ſaith, that there is no perſon againſt whom the iſſue when he commeth to the land without folly may bring his action; and ſaith alſo, that this is the principall cauſe of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in taile ſuffer a common recovery in which there is error, and after tenant in taile diſſeiſeth the recoveror and dieth,

(6 Rep. 58. b. 1 Sid. 65. 2 Roll. Abr. 419.) Lib. 3. f. 3. the Marqueſſe of Wincheſter's caſe. (3 Rep. 3.)

[349. b.]

dieth, here the iſſue in taile hath an action, viz. a writ of error; but as long as the recoverie remaineth in force, he hath no right, and therefore in that caſe there is no remitter. (1)

If *B.* purchaſe an advowſon, and ſuffereth an uſurpation and ſix moneths to paſſe, and after the uſurper granteth the advowſon to *B.* and his heires, *B.* dieth, his heire is not remitted, becauſe his right to the advowſon was remedileſſe, viz. a right without an action. (2)

Tenant in taile of a mannor whereunto an advowſon is appendant maketh a diſcontinuance, the diſcontinuee granteth the advowſon to tenant in taile and his heires, tenant in taile dieth, the iſſue is not remitted to the advowſon, becauſe the iſſue had no action to recover the advowſon before he recovered the mannor whereunto the advowſon was appendant. And ſo it is of all other inheritances regardant, appendant, or appurtenant; a man ſhall never be remitted to any of them before he recontinueth the mannor, &c. whereunto they are regardant, appendant, or belonging. (Ant. 122. b.) 5 H. 7. 35.

Car nul ne poet clamer droit en les appurtenances ne en les acceſſories que nul droit ad en le principall. Britton fol. 126.

[e] *Item, excipi poteſt, &c. quamvis jus habeat in tenemento et pertinentiis, primò recuperare debet tenementum ad quod pertinet advocatio, et tunc poſtea præſentet et non ante, et de hâc materiâ in Rotulo de termino Sancti Michaelis, anno regis Henrici tertio in comitatu Norff. de Thomâ Bardolfe.* [e] Bract. li. 4. f. 243. b. 8 R. 2. Quare Imp. 199. 2 H. 4. 18. 14 H. 6. 15, 16. 8 H. 6. 17. 33 H. 6. 15. F. N. B. 35. B. & 36 F. 24 E. 3. Diſcont. 16. 33 H. 6. Dier 48. b. (Ant. 324. b. 333. b. Poſt. 363. b.)

But, on the other ſide, if a man be remitted to the principall, he ſhall alſo be remitted to the appendant or acceſſory, albeit it were ſevered by the diſcontinuee, or other wrong doer. And therefore if tenant in taile be of a mannor whereunto an advowſon is appendant, and infeoffeth *A.* of the mannor with the appurtenances, *A.* re-infeoffeth the tenant in taile, ſaving to himſelfe the advowſon, tenant in taile dieth; his iſſue being remitted to the mannor, is conſequently remitted to the advowſon, although at that time it was ſevered from the mannor. So it is in the ſame caſe if tenant in taile had beene diſſeiſed, and the diſſeiſor ſuffer an uſurpation, if the diſſeiſee enter into the mannor, he is alſo remitted to the advowſon,

Sect. 662.

ITEM, ſi terre ſoit taile a un home et a ſa feme, et a les heires de lour deux corps engendres les queux ont iſſue file, et le feme devy, et le baron prent auter feme, et ad iſſue un auter file, et diſcontinua le taile, et puis diſſeiſie le diſcontinuee et iſſint moruſt ſeiſie, ore le terre diſcendera a les deux files, * *Et*

[350. a.]

ALSO, if land be entailed to a man and to his wife, and to the heires of their two bodies begotten, who have iſſue a daughter, and the wife dieth, and the huſband taketh another wife, and hath iſſue another daughter, and diſcontinue the taile, and after he diſſeiſeth the diſcontinuee and ſo die ſeiſed, now the land ſhal

* *Et* not in L. and M. nor Roh.

(1) [See Note 302.]

(2) This ſeems to be altered by the aforementioned ſtatute of 7. Ann. c. 18. *Note to the 11th edition.*

en ceſt cas quant al eigne file, que eſt inheritable per force de le tayle, ceo † n'eſt un remitter forſque de le moity. Et quant al auter moity, el eſt mis a ſuer ſon action de formedon *envers ſa ſoer. Car en ceſt cas les deux ſoers ne ſont pas tenants en parcenary, mes ſont tenants en common, pur ceo que ils ſont eins per divers titles. Car l'un ſoer eſt eins en ſon remitter per force de le taile, quant a ceo que a luy affiert; et l'auter ſoer eſt eins quant a ceo que a luy affiert en fee ſimple per le diſcent ſon pier, ‡ &c.*

ſhal deſcend to the two daughters. And in this caſe as to the eldeſt daughter, who is inheritable by force of the tayle, this is no remitter but of the moitie. And as to the other moitie ſhe is put to ſue her action of *formedon* againſt her ſiſter. For in this caſe the two ſiſters are not tenants in parcenarie, but they are tenants in common, for that they are in by divers titles. For the one ſiſter is in her remitter by force of the entaile, as to that which to her belongeth; and the other ſiſter is in as to that to her belongeth in fee ſimple by the diſcent of her father, &c.

44 E. 3. 26. 19 H. 6. 39. (Plo. 246. a.)

"*CEO n'eſt remitter forſque pur le moitie, &c.*" Here *Littleton* putteth a caſe where the iſſue in taile ſhall be remitted to a moitie, becauſe but a moity of the land deſcended unto her, and there cannot be any remitter, but for ſo much as commeth to the iſſue by diſcent, or by any other meanes without his folly; and in this caſe by act in law the coparcenary is defeated, for the daughters are in by ſeverall titles, viz. the eldeſt daughter is tenant in taile *per formam doni*, by the remitter of the one moitie; and the youngeſt ſeiſed in fee ſimple by diſcent of the other moietie, againſt whom the other ſiſter in taile may have her *formedon*. (1)

Sect. 663.

EN meſme le manner eſt, ſi tenant en tayle enfeoffa ſon heire apparant en le taile (eſteant l'heire deins age), et un auter jointenant en fee, et le tenant en tayle moruſt; ore l'heire en tayle eſt en ſon remitter quant a l'un moity, et quant a l'auter moitie il eſt mis a ſon briefe de formedon, ‖ *&c.*

IN the ſame manner it is, if tenant in taile enfeoffe his heire apparant in tayle (the heire being within age), and another jointenant in fee, and the tenant in tayle dieth; now the heire entayle is in his remitter as to the one moitie, and as to the other moitie hee is put to his writ of *formedon*, &c.

(2 Roll. Abr. 41.)

Vide Sect. 666.

"*LE heire, &c. eſt en ſon remitter quant a l'un moitie, &c.*" Hereby it appeareth that albeit joyntenants be ſeiſed *pro indiviſo per my et per tout*, yet each of them hath in judgement of law but a right to a moitie; and therefore the iſſue in taile in this caſe is remitted but to a moity, and is tenant in common but with the other feoffee. And ſo it is if the diſcontinuee, after the death of tenant in tayle, make a charter of feoffment to the iſſue in tayle, being

† *n'eſt—eſt*, L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
‖ *&c.* not in L. and M. nor Roh.

(1) [See Note 303.]

being within age, who hath right, and to a ſtranger in fee, and make livery to the infant in name of both; the iſſue is not remitted to the whole, but to the halfe: for firſt he taketh the fee ſimple, and after the remitter is wrought by operation of law, and therefore can remit him but to a moitie. But of this ſufficient hath beene ſaid in the Chapter of Joyntenants.

[350. b.]

Sect. 664.

*ITEM, ſi tenant en taile enfeoffa ſon heire apparant, l'heire eſteant de pleine age al temps de feoffment, et puis le tenant en taile moruſt; ceo n'eſt remitter al heire, pur ceo que il fuit ſa folly, que il eſteant de pleine age voile prendre tiel feoffment, &c. Mes tiel folly ne poit eſtre adjudge en l'heire eſteant deins age * al temps del feoffment, &c.*

ALSO, if tenant in tail enfeoffe his heire apparant, the heire being of full age at the time of the feoffment, and after tenant in taile dieth; this is no remitter to the heire, becauſe it was his folly, that being of full age hee would take ſuch feoffment, &c. But ſuch folly cannot be adjudged in the heire being within age at the time of the feoffment, &c.

BY this feoffment, albeit the heire apparent hath ſome benefit in the life of his anceſtor, yet is he thereby (beſides his owne) ſubject during his life to all charges and incumbrances made or ſuffered by his anceſtor. And therefore our author ſaith well, *que il fuit ſon folly que il eſteant de pleine age voile prender tiel feoffment*, but folly ſhall not be judged in one within age in reſpect of his tender yeares, and want of experience. (Ant. 171. b. 187. a. 246. a. 357. b. 398. b.) 40 E. 3. 44. 18 H. 4. 25.

Sect. 665.

ITEM, ſi tenant en taile enfeoffa un feme en fee, et moruſt, et ſon iſſue deins age prent meſme la feme † a feme; ceo eſt un remitter al enfant ‡ deins age, et la feme donque n'ad rien, pur ceo que le baron et la feme ſont forſque come un perſon en ley. Et en ceſt cas le baron ne poit ſuer briefe de formedon, *ſinon que il voiloit ſuer envers luy meſme, le quel ſerroit enconvenient; et pur cel cauſe la ley adjudgera l'heire en ſon remitter, pur ceo que nul folly poit eſtre ‖ adjudge en luy eſteant deins age al temps d'eſpouſels, &c. Et ſi l'heire ſoit en ſon*

ALSO, if tenant in taile enfeoffe a woman in fee, and dyeth, and his iſſue within age taketh the ſame woman to wife; this is a remitter to the infant within age, and the wife then hath nothing, for that the huſband and his wife are but as one perſon in law. And in this caſe the huſband cannot ſue a writ of *formedon*, unleſſe he will ſue againſt himſelfe, which ſhould be inconvenient; and for this cauſe the law adjudgeth the heire in his remitter, for that no folly can bee adjudged in him being within age at time of the eſpouſels, &c.

* *&c.* added L. and M. and Roh.
† *a feme* not in L. and M. nor Roh.
‡ *deins age* not in L. and M. nor Roh.
‖ *adjudge—avette*, L. and M and Roh.

ſon remitter per force de le taile, il enſuiſt per reaſon, que la feme n'ad riens, &c. Car entant que le baron et ſa feme ſont come un perſon, la terre ne poit eſtre ſevere per moities; et pur cel cauſe le baron eſt en ſon remitter de l'entiertie. Mes autrement eſt ſi tiel heire fuit de pleine age al temps de les eſpouſels, car donques le heire n'ad riens forſque en droit ſa feme, * &c.

&c. And if the heire bee in his remitter by force of the entaile, it followeth by reaſon, that the wife hath nothing, &c. For inaſmuch as the huſband and wife be as one perſon, the land cannot be parted by moities; and for this cauſe the huſband is in his remitter of the whole. But otherwiſe it is if ſuch heire were of full age at the time of eſpouſels, for then the heire hath nothing but in right of his wife, &c.

(Ant. 202. b.) HERE *Littleton* putteth a caſe where the huſband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the coverture *en auter droit.*

Alſo here is to bee obſerved, that the eſtate which doth in this caſe worke the remitter, could not have continuance after the deceaſe of the wife. And ſo on the other ſide, if the huſband make a diſcontinuance, and take backe an eſtate to him and his wife, during the life of the huſband, this is a remitter to the wife preſently, albeit the eſtate is not by the limitation to have continuance after the deceaſe of the huſband; which caſe is proved by the reaſon of the caſe which our author here putteth. And here our author obſerveth the diverſity when the huſband is within age, and when hee is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath beene often ſaid.

Here is alſo to bee noted, that preſently by the marriage within age, the huſband is remitted, and the freehold and inheritance of the wife baniſhed cleane away. [351. a.]

(4 Rep. 29.) "*Priſt meſme la feme al feme.*" Here it is good to be ſeene what things are given to the huſband by marriage. (1) Firſt, it appeareth here by *Littleton*, that if a man taketh to wife a woman ſeiſed in fee [*f*], he gaineth by the intermarriage an eſtate of freehold in her right, which eſtate is ſufficient to worke a remitter, and yet the eſtate which the huſband gaineth dependeth upon uncertaintie, and conſiſteth in privitie [*g*]; for if the wife be attainted of felony, the lord by eſcheat ſhall enter and put out the huſband: otherwiſe it is if the felonie be committed after iſſue had. Alſo, if the huſband be attainted of felonie, the king gaineth no freehold, but a permancie of the profits during the coverture, and the freehold remaineth in the wife [*h*]. Secondly, if ſhe were poſſeſſed of a terme for yeares, yet he is poſſeſſed in her right; but he hath power to diſpoſe thereof by grant or demiſe; and if he be outlawed or attainted, they are gifts in law.

[*f*] 13 H. 4. 6. Stanf. l. 7. b. 18 E. 4. 5. 11 H. 7. 19. 10 H. 6. 11. 7 H. 6. 9. b. Vide Sect. 58.

[*g*] 4 Aſſ. p. 4. 4 E. 3. Aſſ. 166. (1 Rep. 50. a. 1 Roll. Abr. 343, 344. 5 Rep. 17. Hob. 285.)

[*h*] Pl. Com. fol. 260. b. Dame Hale's caſe, 50 Aſſ. 5. 38 H. 6. 23. 21 E. 4. 35. 7 E. 4. 6. 7 H. 7. 2. 10 H. 6. 11.

[*] Mich. 26 & 27 Eliz. inter Annor & Lod- [*] Upon an execution againſt the huſband for his debt, the ſheriffe may ſell the terme during her life; but the huſband can make

* &c. not in L. and M. nor Roh.

(1) [See Note 304.]

make no diſpoſition thereof by his laſt will. Alſo, if he make no diſpoſition or forfeiture of it in his life, yet it is a gift in law unto him if he doe ſurvive his wife; but if he make no diſpoſition, and die before his wife, ſhe ſhall have it againe. And the ſame law is of eſtates by ſtatute merchant, ſtatute ſtaple, *elegit*, wardſhips, and other chattels realls in poſſeſſion.

ington in briefe. de error adjudge in both Courts. 14b. 8. fol. 96. Mat. Manning's caſe.

But if the huſband charge the chattell reall of his wife, it ſhall not binde the wife if ſhee ſurvive him.

7 H. 6. fol. 2. (1 Roll. Abr. 346.)

If a feme ſole be poſſeſſed of a chattell reall, and be thereof diſpoſſeſſed, and then taketh huſband, and the wife dieth, and the huſband ſurviveth, this right is not given to the huſband by the intermarriage, but the executors or adminiſtrators of the wife ſhall have it; ſo it is if the wife hath but a poſſibilitie.

Vid. Sect. 58.

In the ſame manner it is if the wife be poſſeſſed of chattels reals *en auter droit*, as executrix or admiuiſtratrix, or as gardeine in ſocage, &c. and ſhe intermarrieth, the law maketh no gift of them to the huſband, although he ſurviveth her. In the ſame manner if a woman grant a terme to her owne uſe, taketh huſband, and dieth, the huſband ſurviving ſhall not have this truſt, but the executors or adminiſtrators of the wife [*i*]; for it conſiſteth in privitie: and ſo hath it beene reſolved by the juſtices. Chattels reals conſiſting meerely in action the huſband ſhall not have by the intermarriage, unleſſe he recovereth them in the life of the wife, albeit he ſurvive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage and the like, whereunto the wife was intitled before the marriage.

Pl. Com. fo. 294. Oſborne's caſe, and there fol. 192. b. Wrotesley's caſe.

[*i*] Paſch. 32 Eliz. in Cancellar. in Witham's caſe. Hill. 38 Eliz. in Cancell. in Waterhouſe's caſe. Wrotesley's caſe, ubi ſup.

But chattels reals being of a mixt nature, viz. partly in poſſeſſion, and partly in action, which happen during the coverture, the huſband ſhall have by the intermarriage, if hee ſurvive his wife, albeit he reduceth them not into poſſeſſion in her life-time; but if the wife ſurviveth him ſhe ſhall have them. As if the huſband be ſeiſed of a rent ſervice, charge, or feck, in the right of his wife, the rent become due during the coverture, the wife dieth, the huſband ſhall have the arerages; but if the wife ſurvive the huſband ſhe ſhall have them, and not the executors of the huſband. So it is of an advowſon, if the church become voyd during the coverture [*k*], he may have a *quare impedit* in his owne name, as ſome hold: but the wife ſhall have it if ſhe ſurvive him; and the huſband if he ſurvive her: *et ſic de ſimilibus.*

13 E. 3. Quar. Imp. 57. 14 H. 4. 12. 38 E. 3. 35. b. 50 E. 3. 13. 10 H. 6. 11. F. N. B. 121. 22 H. 6. 25. 29 E. 3. 40. 11 R. 2. Account 49. 12 R. 2. Briefe 639. 5 E. 3. Execut. 99.

[*k*] 50 E. 3. 13. 28 H. 6. 9. 7 H. 7. 2.

[351. b.] But if the arerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the huſband ſhould not have them by the common law, although he ſurvived her. And ſo it is of releeſes, *mutatis mutandis*. [*l*] But now by the ſtatute of 32 *H.* 8. *cap.* 37, if the huſband ſurvive the wife, he ſhall have the arerages as well incurred before the marriage, as after.

26 E. 3. 64. 10 H. 6. 11. F. N. B. 121. 22 H. 6. 25.

[*l*] Lib. 4. fol. 51, in Ongel's caſe. Hil. 17 El. Rot. 457.

in Com. Baneo, Sharp's caſe. 21 E. 4. 4. 21 H. 7. 29. 11 H. 7. 4. 26 H. 8. 7. 43 E. 3. 10. 3 H. 6. 23. 37. 4 H. 6. 5. 14 E. 2. Det. 73. 5 E. 2. Ibid. 169. 30 E. 3. 48 E. 3. 12. 12 R. 2. Bre. 638, 639. 16 E. 4. 8. 16 H. 6. Bre. 939.

But the marriage is an abſolute gift of all chattels perſonals in poſſeſſion in her owne right, whether the huſband ſurvive the wife or no; but if they be in action, as debts by obligation, contract, or otherwiſe,

otherwiſe, the huſband ſhall not have them unleſſe he and his wife recover them. And of perſonall goods, *en auter droit*, as executrix or adminiſtratrix, &c. the marriage is no gift of them to the huſband, although he ſurvive his wife. (1)

[m] 43 E. 3. 8. V. 10 H. 6. 11. 39 E. 3. 17.

[*m*] If an eſtray happen within the mannor of the wife, if the huſband die before ſeiſure, the wife ſhall have it, for that the propertie was not in the wife before ſeiſure.

But as to perſonall goods, there is a diverſitie worthy of obſervation betweene a propertie in perſonall goods (as is aforeſaid) and a bare poſſeſſion; for if perſonall goods be bailed to a feme, or if ſhe finde goods, or if goods come to her hands as executrix to a bailiffe, and taketh a huſband, this bare poſſeſſion is not given to the huſband, but the action of detinue muſt be brought againſt the huſband and wife.

But now let us heare *Littleton*.

Vide Sect. 87, &c.

"*Le quel ſerra inconvenient.*" This argument *ab inconvenienti*, our author hath uſed in many places.

(Ant. 350. b.)

Sect. 666.

*ITEM, ſi feme ſeiſie de certaine terre en fee prent baron, le quel aliena meſme la terre a un auter en fee, * l'alienee leſſa meſme la terre al baron et ſa feme pur terme de lour deux vies, ſavant le reverſion al leſſor et a ſes heires; en ceſt cas la feme eſt eins en ſon remitter, et el eſt ſeiſie en fait en ſon demeſne come de fee, ſicome el fuit advant, pur ceo que le repriſel del eſtate ſerra adjudge en ley le fait le baron, et nemy le fait la feme; iſſint nul folly poit eſtre adjudge en la feme, que eſt covert en tiel caſe. Et en ceſt caſe le leſſor n'ad † rien en le reverſion, pur ceo que la feme eſt ſeiſie en fee, ‡ &c.*

ALSO, if a woman ſeiſed of certaine land in fee taketh huſband, who alieneth the ſame land to another in fee, the alienee letteth the ſame land to the huſband and wife for terme of their two lives, ſaving the reverſion to the leſſor and to his heires; in this caſe the wife is in her remitter, and ſhe is ſeiſed in deed in her demeſne as of fee, as ſhee was before, becauſe the taking backe of the eſtate ſhall be adjudged in law the fact of the huſband, and not the fact of the wife; ſo no folly can be adjudged in the wife, which is covert in ſuch caſe. And in this caſe the leſſor hath nothing in the reverſion, for that the wife is ſeiſed in fee, &c.

21 E. 3. 26. 29 E. 3. 43. 41 E. 3. Remit. 11. 19 E. 3. Remit. 14. 35 Aſſ. 12. 38 E. 3. 24.

"*LA feme eſt ſon remitter.*" By this it appeareth, that albeit there be no moities betweene huſband and wife, yet this is a remitter preſently, and ſtandeth not upon the ſurvivor of the wife, as ſome have thought: for if the eſtate gained by intermarriage be a ſufficient eſtate to worke a remitter; *à fortiori*, an eſtate made to the huſband and wife ſhall worke a remitter in the wife. And ſo

* *et* added L. and M. and Roh.
† *eſtate* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

(1) [See Note 305.]

ſo it is if tenant in taile infeoffe his iſſue being within age, and his wife in fee, and dieth; this is a remitter to the iſſue preſently, by the death of tenant in taile; though ſome have thought the contrarie. 39 E. 3. 29, 30. 41 E. 3. 17. 46 E. 3. 20. b. 26 E. 3. 69. Vi. Sect. 676. 11 R. 2. Remit. 12. 44 E. 3. 17.

[352. a.] Here alſo it appeareth, that no follie in this caſe can be adjudged in a feme covert, for the taking backe of the eſtate ſhall be adjudged in law the act of the huſband. The Marques of Winch. caſe, ub. ſup. (Hob. 71.)

Note in the caſe of the feme covert, ſhe may be remitted in the life of the diſcontinuor, becauſe ſhe hath a preſent right: but in the caſe of tenant in taile, the iſſue cannot be remitted in the life of the diſcontinuor, becauſe the iſſue hath no right untill his deceaſe.

Sect. 667.

*MES en ceſt caſe ſi le leſſour voile ſuer action de waſt vers le baron et ſa feme, pur ceo que le baron avoit fait waſt, le baron ne poit barrer le leſſor pur monſtre ceo, que le repriſel del eſtate fait a luy et a ſon feme fuit un remitter a ſa feme, pur ceo que le baron eſt eſtoppe a dire ceo * que eſt encounter ſon feoffment, et ſon repriſel demeſne del eſtate pur terme de vie a luy et a ſa feme. Et uncore le leſſor n'ad † un reverſion, pur ceo que le fee ſimple eſt en la feme. Et iſſint home poit veier un matter en ceo caſe, que home ſerra eſtoppe per un matter en fait, coment que nul eſcripture ſoit fait per fait indent ou auterment.*

BUT in this caſe if the leſſor will ſue an action of waſt againſt the huſband and his wife, for that the huſband hath committed waſt, the huſband cannot barre the leſſor by ſhewing this, that the taking backe of the eſtate to him and to his wife was a remitter to his wife, becauſe the huſband is ſtopped to ſay that which is againſt his owne feoffement, and taking backe of the eſtate for termie of life to him and to his wife. And yet the leſſor hath no reverſion, for that the fee ſimple is in the wife. And ſo a man may ſee one thing in this caſe, that a man ſhall bee ſtopped by matter in fact, though there bee no writing by deed indented, or otherwiſe.

" *PUR ceo que baron eſt eſtoppe a dire, &c.*"

" *Eſtoppe*" commeth of the French word *eſtoupe*, from whence the Engliſh word ſtopped: and it is called an eſtoppel or concluſion, becauſe a man's owne act or acceptance ſtoppeth or cloſeth up his mouth to alleage or plead the truth: and *Littleton*'s caſe here proveth this deſcription. Li. 2. f. 4. b. Goddard's caſe. V. Sect. 41 & 693. 695. 679. (Poſt. 363. b.)

Touching eſtoppels, which is an excellent and curious kinde of learning, it is to be obſerved, that there be three kinde of eſtoppels, viz. by matter of record, by matter in writing, and by matter *in paiis*. (Cro. Car. 388. 1 Roll. Abr. 865.)

[a] By matter of record, viz. by letters patents, fine, recoverie, pleading, taking of continuance, confeſſion, imparlance, warrant of atturney, admittance. [a] 43 Aſſ. 29. 8 H. 4. 7, 8. 22 Aſſ. 54. 15 E. 3. Eſtop. 239. 4 E. 3. ib. 133. (1 Roll. Abr. 868.)

* *que eſt* not in L. and M. nor Roh. † *un—null*, L. and M. and Roh.

[b] By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, [c] by defeasance by deed indented or deed poll.

[b] 4 H. 4. 1. 8 H. 7. 6. 13 H. 7. 24. 15 E. 4. 28. 41 E. 3. Estop. 12. 12 R. 2. ib. 212. [c] 8 R. 2. Estop. 283. 35 H. 6. 18. 3 H. 6. 16. 16 H. 7. 5. 34 H. 6. 19. 14 H. 4. 29.

By matter *in pais*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case that *Littleton* putteth; whereof *Littleton* maketh a speciall observation, that a man shall be estopped by matter in the countrey, without any writing. (1)

(1 Leo. 82. 158. 4 Rep. 53. 8 Rep. 53, 54.)

To make the reader more capable of the learning of estoppels, these few rules, amongst others, are to be knowne.

[d] First, that every estoppel ought to be reciprocall, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppell: [e] privies in bloud, as the heire; privies in estate, as the feoffee, lessee, &c.; privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels; and that a rebutter is a kinde of estoppell.

[d] 38 H. 6. 19. 50. 50 H. 6. 2. 31 E. 3. Estop. 240. 33 Ass. 18. 30 Ass. 51. 14 Ass. 9. 18 E. 4. 1. (3 Mod. 141.) [e] 8 Ass. 58. Br. Fines, 73. 8 H. 6. 17. 21 E. 3. 35. 38 E. 3. 31. 20 E. 3. Estop. 187.

[f] Secondly, that every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference. [352. b.]

[f] 21 E. 4. 4. 23 Ass. 14. 17 H. 6. Estop. 273. 18 E. 3. 30. 7 H. 7. 6 & 16.

[g] Thirdly, every estoppell ought to be a precise affirmation of that which maketh the estoppell, and not be spoken imperfonally; as if it be said, *Ut dicitur, quia imperfonalitas non concludit, nec ligat: imperfonalis dicitur, quia fine perfonâ.* [h] Neither doth a recitall conclude, because it is no direct affirmation.

[g] 46 E. 3. 33. 29 Ass. 38. Pl. Com. 398. [h] 35 H. 6. 33. 46 E. 3. 12. 49 E. 3. 14. 8 Ass. 3. 45 Ass. 5. 3 El. Dy. 196. 11 El. ib. 280. 9 H. 6. 60.

[i] Fourthly, a matter alleaged that is neither traversable nor materiall, shall not estoppe.

[i] 5 E. 4. 7. 8 E. 4. 19. 10 E. 4. 12. 22 E. 4. 38. 39 Ass. 9. 35 H. 6. 20.

[k] Fifthly, regularly a man shall not be concluded by acceptance or the like, before the title accrued.

[k] 38 H. 6. 16. 4 E. 3. 22. 6 H. 4. 7. 31 E. 1. Gard. 155. F. N. B. 142 E.

[l] Sixthly, estoppell against estoppell doth put the matter at large.

[l] 12 H. 7. 4. 20 H. 6. 29. 3 H. 4. 9. 41 E. 3. 4. 11 H. 4. 30.

[m] Seventhly, matters alleaged by way of suppofall in counts shall not conclude after non-suit: otherwise it is after judgement given; and after non-suit, albeit the suppofall in the count shall not conclude, yet the barre, title, replication, or other pleading of either partie, which is precisely alleaged, shall conclude after non-suit; and hereby are the bookes reconciled.

[m] 2 R. 3. 14. 2 R. 2. Estoppell 20. 40 E. 3. 21. 12 E. 4. 13. 18 E. 3. 31. 35. 44 E. 3. 45. 17 Ass. 27. 45 E. 3. 2. 21 H. 7. 24. 5 E. 4. 7. 7 E. 4. 19. 3 E. 4. 11. 4 E. 3. 54. 7 E. 6. Br. Estop. 162. 11 H. 4. 30. 30 E. 3. 21. 31 Ass. 14.

(1) [See Note 306.]

Eighthly,

Eighthly, where the veritie is apparant in the ſame record, there the adverſe party ſhall not be eſtopped to take advantage of the truth; for he cannot be eſtopped to alleage the truth, when the truth appeareth of record. [n] If a fine be levied without any originall, it is voydable, but not void; but if an originall be brought, and a *retrait* entred, and after that a concord is made, or a fine levied, this is void, in reſpect the veritie appeareth of record. [o] An impropriation is made after the death of an incumbent, to a biſhop and his ſucceſſors; the biſhop by indenture demiſeth the parſonage for fortie yeares, to begin after the death of the incumbent; the deane and chapiter confirmeth it, the incumbent dieth; this demiſe ſhall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent.

[n] 37 Aſſ. 17. 38 H. 6. 12. 5 El. Dy. 222.

[o] 7 El. Dy. 244.

[p] Ninthly, where the record of the eſtoppell doth run to the diſabilitie or legitimation of the perſon, there all ſtrangers ſhall take benefit of that record; as outlawrie, excommengement, profeſſion, attainder of *præmunire*, of felonie, &c. baſtardie, muliertie, and ſhall conclude the partie, though they be ſtrangers to the record. *Vide in Littleton cap. Villenage, Sect.* 196, 197, &c. But of a record concerning the name of the perſon, qualitie, or addition, no eſtranger ſhall take advantage, becauſe he ſhall not be bound by it. But *nota*, reader, that in caſe of the muliertie *primâ facie*, an eſtranger ſhall take benefit of it, &c. But yet becauſe he may be a *mulier* by the eccleſiaſticall law, and a baſtard by the common law, therefore againſt ſuch a certificate pleaded, the adverſe partie may alleage the ſpeciall matter, and confeſſe the certificate of the biſhop according to the eccleſiaſticall law, and alleage further the ſpeciall matter according to the common law, whereunto the adverſe partie muſt anſwer; and ſo are the books that treat of this matter to be reconciled. (1) But now let us returne to *Littleton*.

[p] Bract. f. 420, 26 Aſſ. 64. 39 Aſſ. 10. 11 H. 4. 84. 7 H. 6. 7. 33 Aſſ. 5. 11 E. 3. Eſtop. 229. 21 E. 3. 39. 19 R. 2. Eſtop. 282. 3 E. 3. ib. 23. 33 E. 3. Eſtop. Stath. Le ſtat. de 9 H. 6. ca. 11. 30 H. 6. 2. Doct. & Stud. 69. 34 H. 6. 39. 18 E. 4. 1. b. 10 E. 4. 16.

Sect. 668.

*MES ſi en action de waſt le baron fait default a le graund diſtreſſe, et la feme pria d'eſtre receive et ſoit receive, el monſtra bien tout le matter, et coment el eſt en ſon remitter, et el barrera le leſſor de ſon action, * &c.*

BUT if in the action of waſt the huſband make default to the grand diſtreſſe, and the wife pray to be received, and is received, ſhee may well ſhew the whole matter, and how ſhee is in her remitter, and ſhee ſhall barre the leſſor of his action, &c.

"*LA feme pria d'eſtre reſceive et ſoit reſceive.*" Receipt, *receptio*, commeth of the Latine verbe *recipere*, ſo called becauſe the wife, upon the default of her huſband, is received as a feme ſole alone, without her huſband, to defend her right; and it is alſo called *defenſio juris;* and in this caſe the wife may bee received by the [a] ſtatute: and yet [b] ancient authors who wrote before the ſtatute, doe ſpeake of a kind of receit at the common law,

(Ant. 192. b.)

20 E. 1. Defenſio juris.

[a] W. 2. ca. 3. [b] Bract. f. 393. Mir. lib. 3. cap. Exceptions.

* &c. not in L. and M. nor Roh.

(1) See note 1. to page 245. a.

law. The civilians call reſceit, *admiſſionem tertii pro ſuo intereſſe*, which more properly is reſembled to the receit of him in the reverſion or remainder, that is no part to the writ.

Sect. 669. [353. a.]

*CAR en cheſcun cas lou feme eſt receive pur default ſon baron, el pledera et avera meſme l'advantage en plee pledant, come el fuiſſoit feme ſole, * &c. Et coment que l'alienee fiſt le leas al baron et a ſa feme per fait endent, uncore ceo eſt remitter a la feme. Et auxy, coment que l'alienee rendiſt meſme la terre al baron et a ſa feme per fine pur terme de lour vies, uncore ceo eſt un remitter al feme, pur ceo que feme covert que prent eſtate per fine, ne ſerra my examine per les juſtices, † &c.*

FOR in every caſe where the wife is received for default of her huſband, ſhe ſhall plead and have the ſame advantage in pleading, as ſhee were a woman ſole, &c. And albeit that the alienee made the leaſe to the huſband and wife by deed indented, yet this is a remitter to the wife. And alſo, albeit the alience rendereth the ſame land to the huſband and his wife by fine for terme of their lives, yet this is a remitter to the wife, becauſe a feme covert which takes an eſtate by fine, ſhall not be examined by the juſtices, &c.

"*COME el fuiſſoit feme ſole, &c.*" In this Section foure things are to be underſtood.

Firſt, when a feme covert is received, that ſhe ſhall plead as if ſhe were ſole. And this is regularly true, yet holdeth not in all caſes; [c] for if a feme covert be received in an aſſiſe, and plead a record and faile, therefore ſhe ſhall not be adjudged a diſſeiſor, as ſhee ſhould be if ſhee were ſole, &c. So if a feme covert onely levie a fine executorie, and a *ſcire facias* is brought againſt her and her huſband, if ſhee be received upon the default of her huſband, ſhee ſhall barre the conuſee, which if ſhe had been ſole, ſhee could not doe, and in ſome other caſes.

[c] 37 Aſſ. 1. 17 Aſſ. 17. 29 E. 3. 43. 5 E. 3. Voucher 178.

Secondly, that though the eſtate taken backe be by deed indented, yet that ſhall not hinder the remitter in caſe of a feme covert, or an infant.

Thirdly, that though it be by fine *ſur render*, yet that ſhall not hinder the remitter; becauſe a feme covert is not to be examined upon any fine, but when ſhee and her huſband paſſe ſome eſtate or intereſt, or releaſe her right by a fine of the lands or tenements. (10 Rep. 43.)

Fourthly, if the huſband levie a fine of his wife's lands, and the conuſee grant and render the land to the huſband and wife, although the wife be not partie to the originall, nor to the conuſans, and therefore ſhe ought not by the law to take any preſent eſtate but by way of remainder only; yet here it is proved by *Littleton*, that the grant and render *de facto* to the wife *in præſenti* is not void; for then it could not worke a remitter, but voidable by writ of error; and that avoidable eſtate doth worke a remitter. (1)

Trin. 27 Eliz. inter Owen & Morgan. Rot. 270, in banco communi. Li. 3. fol. 5. the marqueſſe of Winchester's caſe. 7 E. 3. 64. 13 E. 3. Vouch. 119.

"*Ne*

* &c. not in L. and M. nor Roh. † &c. not in L. and M. nor Roh.

(1) [See Note 307.]

"*Ne ſerra my examine per les juſtices, &c.*" The examination of a feme covert ought to be ſecret; and the effect is to examine her, whether ſhee be content to levie a fine of ſuch lands (naming them particularly and diſtinctly, and the ſtate that paſſeth by the fine) of her owne voluntary free will, and not by threats, menaces, or any other compulſorie meanes. (3 Rep. 5. a.)

Sect. 670.

ET hic nota, *que quant aſcun choſe paſſera de la feme que eſt covert de baron per force d'un fine:* [353. b.] *ſicome le baron et la feme ſeſont un conuſance de droit a un auter, &c. ou ſeſoyent un grant et render a un auter, ou releſſent per fine a auter, et ſic de ſimilibus, ſou le droit del feme paſſeroit del feme per force de meſme le fine; en touts tielx caſes la feme ſerra examine devaunt que la fine ſoit accept, pur ceo que tiels fines concluderont tiels femes coverts a touts jours,* * *&c. Mes lou riens eſt move en le fine forſque tantſolement que le baron et la feme preignont eſtate per force de meſme le fine, ceo ne concluder la feme; pur ceo que en tiel cas el jammes ne ſerra my examine,* † *&c.*

AND here note, that when any thing ſhall paſſe from the wife which is covert of a huſband by force of a fine: as if the huſband and wife make conuſance of right to another, &c. or make a grant and render to another, or releaſe by fine unto another, *et ſic de ſimilibus*, where the right of the wife ſhall paſſe from the wife by force of the ſame fine; in all ſuch caſes the wife ſhall be examined before that the fine be taken, becauſe that ſuch fines ſhall conclude ſuch femes coverts for ever. But where nothing is moved in the fine but onely that the huſband and wife doe take an eſtate by force of the ſaid fine, this ſhall not conclude the wife; for that in ſuch caſe ſhe ſhall not be at all examined, &c.

"*QUANT aſcun choſe paſſera de la feme covert, &c. per force d'un fine, &c.*" And of this opinion is [*d*] *Littleton* in our bookes. [*d*] 15 E. 4. 28. 24 E. 3. 31. 42 E. 3. 6. 9 H. 6. 42. 20 E. 3. tit. Cui in vita 10. [*] 29 E. 3. 43. 46 E. 3. 5.

* Therefore if the huſband and wife be tenants in ſpeciall tayle, and they levie a fine at the common law, and after the huſband and wife take backe an eſtate to them and their heires; in this caſe the eſtate tayle is not barred; and yet againſt a fine levied by her ſelfe ſhe cannot be remitted, becauſe thereupon ſhe was examined: but in that caſe if the land deſcend to her iſſue, he ſhall be remitted. (1)

Sect. 671.

ITEM, ſi tenant en taile diſcontinua le taile, et ad ‡ *iſſue file, et moruſt, et la file eſteant de pleine age prent*

ALSO, if tenant in taile diſcontinue the taile, and hath iſſue a daughter, and dieth, and the daughter being

* *&c.* not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *iſſue* not in L. and M. nor Roh.

(1) [See Note 308.]

prent baron, et le diſcontinuee fait un releas de ceo al baron et a ſa feme pur terme de lour vies, ceo eſt un remitter al feme, et la feme eſt eins per force de le taile, cauſâ quâ ſupra.

being of full age taketh huſband, and the diſcontinuee make a releaſe of this to the huſband and wife for terme of their lives, this is a remitter to the wife, and the wife is in by force of the taile, *cauſâ quâ ſupra, &c.*

" *ET la feme eſteant de plein age prent baron, &c.*" Here it appeareth, that her full age when ſhe tooke baron is not materiall, but her coverture at the taking backe of the eſtate. And ſo note a diverſitie betweene a remitter and a diſcent: for if a woman be diſſeiſed, and being of ful age taketh huſband, and then the diſſeiſor dieth ſeiſed, this diſcent ſhall binde the wife, albeit ſhe was covert when the diſcent was caſt, becauſe ſhe was of full age when ſhe tooke huſband, as appeareth before in the Chapter of Diſcents. But albeit the wife that hath an ancient right, and being of full age, taketh a huſband, and the diſcontinuee letteth the land to the huſband and wife for their lives, this is a remitter to the wife; for remitters to ancient rights are favoured in law.

(Ante 246.)

(Hob. 260.)

Sect. 672.

[354. a.]

ITEM, ſi terre ſoit done a le baron et a ſa feme, aver et tener a eux et a les heirs de lour deux corps engendres, et puis le baron aliena la terre en fee, et reprent eſtate a luy et a ſa feme pur terme de lour deux vies; en ceſt cas il eſt remitter en fait a le baron et a ſa feme, maugre le baron. Car il ne poit eſtre un remitter en ceſt cas a la feme, ſinon que ſoit un remitter a le baron, pur ceo que le baron et ſa feme ſont tout un meſme perſon en ley, coment que le baron eſt eſtoppe de claimer. * *Et pur ceo, ceo eſt un remitter en luy enconter ſon alienation et ſon repriſel demeſne, come eſt dit adevant* †.

ALSO, if land be given to the huſband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the huſband alien the land in fee, and take backe an eſtate to him and to his wife for terme of their two lives; in this caſe this is a remitter in deed to the huſband and to his wife, mauger the huſband. For it cannot be a remitter in this caſe to the wife, unleſſe it be a remitter to the huſband, becauſe the huſband and wife are all one ſame perſon in law, though the huſband be ſtopped to claime it. And therefore this is a remitter againſt his owne alienation and repriſel, as is ſaid before.

HERE it appeareth, that the huſband againſt his owne alienation, if he had taken the eſtate to him alone, could not have beene remitted. But when the eſtate is made to the huſband and wife, albeit they be but one perſon in law, and no moities betweene them; yet for that the wife cannot be remitted in this caſe, unleſſe the huſband be remitted alſo, and for that remitters, as hath beene often ſaid, are favoured in law, becauſe thereby the more antient

(Hob. 255.)

and

* *Et pur ceo* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

and better rights are reſtored againe; therefore in this caſe, in judgement of law, both huſband and wife are remitted; which is worthy of great obſervation.

Sect. 673.

ITEM, ſi terre ſoit done a un feme en taile, le remainder a un auter en tayle, le remainder a le tierce en tayle, le remainder al quart en fee, et la feme prent baron, et le baron diſcontinua la terre en fee; per cel diſcontinuance touts les remainders ſont diſcontinues. Car ſi la feme deviaſt ſans iſſue, ceux en le remainder n'averont aſcun remedie forſque de ſuer lour brieſes de formedon *en le re-*
[354. b.] *mainder, quant il avient a lour temps*. Mes ſi apres tiel diſcontinuance, eſtate ſoit fait a le baron et ſa feme pur terme de lour deux vies, ou pur terme d'auter vie, ou auter eſtate, &c. pur ceo que ceo eſt un remitter al feme, ceo eſt † auxy un remitter a touts ceux en le remainder. Car apres ceo que la feme que eſt en ſon remitter moruſt ſans iſſue, ceux en le remainder poyent enter, &c. ſans aſcun action ſuer, &c. En meſme le maner eſt de ceux que ount la reverſion apres tiels tailes ‡.*

ALSO, if land be given to a woman in taile, the remainder to another in taile, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh huſband, and the huſband diſcontinue the land in fee; by this diſcontinuance all the remainders are diſcontinued. For if the wife die without iſſue, they in the remainder ſhall not have any remedie but to ſue their writs of *formedon* in the remainder, when it comes to their times. But if after ſuch diſcontinuance, an eſtate be made to the huſband and wife for terme of their two lives, or for terme of another man's life, or other eſtate, &c. for that this is a remitter to the wife, this is alſo a remitter to all them in the remainder. For after that the wife which is in her remitter be dead without iſſue, they in the remainder may enter, &c. without any action ſuing, &c. In the ſame manner is it of thoſe which have the reverſion after ſuch entailes.

LITTLETON having ſpoken of remitters to the iſſue in taile, who is privie in bloud, and to the wife, who is privie in perſon, now he ſpeaketh of remitters to them in reverſion or remainder expectant, upon an eſtate taile, who are privie in eſtate. And this caſe proveth that the wife is remitted preſently; for the equitie of the law requireth, that as the diſcontinuance of the eſtate in taile is a diſcontinuance of the reverſion or remainder; ſo, that the remitter to the eſtate in taile ſhould be a remitter to them in the reverſion or remainder.

41 E. 3. 17. 41 Aſſ. 1. 36 Aſſ. p. 4.

Tenant for life the remainder to *A.* in taile, the remainder to *B.* in fee, tenant for life is diſſeiſed, a collaterall anceſtor of *A.* releaſeth with warrantie and dieth, whereby the eſtate taile is barred; the tenant for life re-entreth, the diſſeiſor hath an eſtate in fee ſimple determinable

44 Aſſ. p. 15. 44 E. 3. 30. (2 Roll. Ab. 421. 3 Cro. 143. W. Jones, 199.) 20 E. 3. Aid. 29.

* *&c.* added L. and M. and Roh.
† *auxy* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.

determinable upon the eſtate taile, and the remainder of *B.* is reveſted in him; and ſo note in this caſe the eſtate for life and the remainder in fee are reveſted and remitted, and an eſtate of inheritance left in the diſſeiſor. If a fine be levied *ſur grant et render* to one for life or in taile, the remainder in fee, if tenant for life, or in taile, execute the eſtate for life or in taile, this is an execution of the remainder.

Vid. Pl. Com. 489. Nichol's caſe, & fol. 553. in Walſingham's caſe. 17 Eliz. Dier, 344. 25 E. 3. 48. Ass. Reſceit. 28. 49 E. 3. 16.

A gift in taile is made to *B.* the remainder to *C.* in fee, *B.* diſcontinueth and taketh backe an eſtate in taile, the remainder in fee to the king by deed inrolled; tenant in taile dieth, his iſſue is remitted, and conſequently the remainder, as *Littleton* here ſaith; and the diverſity is [*a*] betweene an act in law, for that may deveſt an eſtate out of the king, and a tortious act, or entry, or a falſe and a feined recovery againſt tenant for life or in taile, which ſhall never deveſt any eſtate, remainder, or reverſion out of the king. [*b*] But a recovery by good title againſt tenant for life, or in taile, where the remainder is to the king by defeaſible title, ſhall deveſt the remainder out of the king, and reſtore and remit the right owners. (1)

[*a*] Seignior Stafford's caſe, lib. 8. fol. 76 b. [*b*] Cholmley's caſe, lib. 2. 53. 7 R. 2. Aide le Roy, 61. 22 E. 3. 7.

Sect. 674, 675.

ITEM, ſi home leſſa un meaſe a un feme pur terme de ſa vie; ſavant le reverſion al leſſour, et puis un fuiſt un feint et faux action envers la feme, et recoveraſt le meaſe envers luy per default, iſſint que la feme puit aver envers luy un quod ei deforceat, *ſolonque le ſtatute de Weſtm. 2. ore le reverſion le leſſor eſt diſcontinue, iſſint que il ne poit aver aſcun action de waſt. Mes en ceſt caſe ſi la feme prent baron, et celuy que recoveraſt leſſa le meaſe al baron et a ſa feme pur terme de lour deux vies, la feme eſt eins en ſon remitter per force del primer leaſe.*

ALSO, if a man let a houſe to a woman for terme of her life, ſaving the reverſion to the leſſor, and after one ſue a feyned and falſe action againſt the woman, and recovereth the houſe againſt her by default, ſo as the woman may have againſt him a *quod ei deforceat*, according to the ſtatute of Weſtm. 2. now the reverſion of the leſſor is diſcontinued, ſo that he cannot have any action of waſte. But in this caſe if the woman take huſband, and he which recovereth let the houſe to the huſband and his wife for terme of their two lives, the wife is in her remitter by force of the firſt leaſe.

Sect. 675.

ET ſi le baron et la feme font waſt, le primer leſſor avera envers eux breve de waſt, pur ceo que entant que la

AND if the huſband and wife make waſte, the firſt leſſor ſhall have a writ of waſt againſt them, for that

(1) [See Note 309.]

la feme eſt en ſon remitter, il eſt remiſe a ſon reverſion. Mes ſemble en ceſt cas, ſi celuy que recoveraſt per le faux action, voile porter auter briefe de waſt envers le baron et ſa feme, le baron n'ad auter remedy envers luy, mes de faire default a la graund diſtres, &c. et cauſer la feme d'eſtre receive, et de pleder cel matter envers le ſecond leſſor, et mouſtrer coment l'action per que il recoveraſt fuit faux et feint en ley, &c. iſſint le feme poit * *luy barrer, &c.*

that inaſmuch as the wife is in her remitter, he is remitted to his reverſion. But it ſeemeth in this caſe, if hee that recovereth by the falſe action, will bring another writ of waſte againſt the huſband and his wife, the huſband hath no other remedie againſt him, but to make default to the grand diſtreſſe, &c. and cauſe the wife to be received, and to plead this matter againſt the ſecond leſſor, and ſhew how the action wherby hee recovered was falſe and fained in law, &c. ſo the wife may bar him.

"FEINT *et faux action,*" 1. *Actio ficta et falſa,* but hereof *Littleton* ſpeaketh himſelfe in this Chapter. (5 Rep. 85. 2 Inſt. 350. 11 Rep. 62.)

"*Quod ei deforceat,*" is a writ that is given by [c] ſtatute to any tenant for life or in tayle upon a recovery by default againſt them in a *præcipe*, and lyeth againſt the recoveror and his heires, [355. a.] in which caſe the particular tenant was without remedie at the common law, becauſe hee could not have a writ of right. And it is called a *quod ei deforceat*, for that they are part of the words of that writ, viz. *Præcipe A. quod, &c. reddat B. unum meſuagium, &c. quod clamat eſſe jus et maritagium ſuum, et quod idem A. ei injuſtè deforceat.* [c] W. 2. cap. 4. (Ant. 331. b.) Bracton lib. 4. 367. Fleta lib. 5. cap. 23. & li. 6. cap. 14. 7 E. 3. 62. F. N. B. 155. (6 Rep. 8, b.) (Cro. Jac. 292. Cro. Car. 178. 444.)

"*Recoveraſt, &c. per default.*" There hath beene a queſtion in our bookes upon theſe words (by default): as for example, whether a recoverie had by default in an action of waſte againſt tenant in dower, or by the courteſie, a *quod ei deforceat* lyeth by the ſaid ſtatute. And divers hold opinion, that in that caſe no *quod ei deforceat* lieth, for that judgement is not given by default; for notwithſtanding the default, there goeth out a writ to enquire *de vaſto facto, et quod vaſtum prædictum* A. (*le defendant*) *fecit;* ſo as the defendant may give evidence, and the jurors may finde for the defendant, that no waſte was done: as in the aſſiſe albeit it bee awarded by default, yet may the tenant give evidence, and the recognitors of the aſſiſe may finde for the tenant; and therefore in thoſe caſes, the defendant or tenant *non amittit per defaltam*, as the ſtatute and *Littleton* ſpeaketh, and they cite *F. N. B.* in the point. (1) (F. N. B. 155. b.) W. 2. cap. 4. F. N. B. fol. 155. E.

Secondly, they hold that a *quod ei deforceat* lieth where the tenant can have no remedie by attaint; but in this caſe (ſay they) an attaint doth lie. 2 H. 4. 2. 21 H. 6. 56. 41 E. 3. 8. 3 H. 6. 29. 22 E. 3. 19.

[355. b.] Thirdly they, hold, that in an action of waſte although it be brought againſt a tenant in dower, or tenant by the courteſie that have a freehold, yet the dammages are the principall; for they were recoverable againſt tenant in dower and by the courteſie by the common law; and the ſtatute of *Gloceſter* gave the (8 Rep. 85.)

* *luy* not in L. and M. nor Roh.

(1) [See Note 310.]

the place waſted but for a penaltie, ſo as the nature of the action (ſay they) remaineth ſtill to bee perſonall, for that the dammages are the principall: [d] and in proofe hereof they cite divers authorities in law. And if two bring an action of waſte, the releaſe of one of them is a good barre againſt the other, [e] and ſo reſolved by the whole court; which proveth (ſay they) that the dammages are the principall: for if the land were the principall, the releaſe of one of them ſhould not barre the other, no more than in an aſſiſe, a writ of ward, an *ejectione firmæ*, &c.

(7 Rep. 68. b.) [d] 34 H. 6. 7. 40 E. 3. 37 & 38 E. 3. [e] 9 H. 5. 15. 30 H. 6. tit. Bar. 59.

Laſtly, they ſay, that in actions where dammages are to be recovered, and the land is the principall, the demandant never counteth to dammages, and yet ſhall recover them: but in an action of waſte the plaintiffe counteth to his dammage; and if the dammages be the principall, then cleerely no *quod ei deforceat* lieth.

Others doe hold the contrarie: and as to the firſt they ſay, that albeit that in the writ of waſte, judgement is not only given upon the default, yet the default is the principall, and the cauſe of awarding of the writ to enquire of the waſte as an incident thereunto: and the law alwayes hath reſpect to the firſt and principall cauſe; and therefore upon ſuch a recoverie [*] a writ of deceit lieth; and that writ lieth not but where the recoverie is by default. So in an action of waſte againſt the huſband and wife, upon the default of the huſband, the wife ſhal be received; and yet the ſtatute there ſpeaketh alſo, *per defaltam*. So upon ſuch a recoverie in waſte againſt the baron and feme by default, the wife ſhall have a *cui in vitâ* by the ſtatute; and it ſpeaketh where the recoverie is *per defaltam*. And albeit the defendant may give in evidence, if he knoweth it; yet when he makes default, the law preſumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reaſon, that ſeeing the ſtatute, that is a beneficiall ſtatute, hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the truth and right ſhall be tried. And ſo it is of a recoverie by default in an aſſiſe; albeit the recognitors of the aſſiſe give a verdict, a *quod ei deforceat* lieth. And all this as to this point was reſolved by the whole court of common pleas; and ſo the doubt in 41 *E.* 3. 8. well reſolved. *Nota*, if tenant for life make default after default, and he in the reverſion is received and plead to iſſue, and it is found by verdict for the demandant, the default and the verdict are cauſes of the judgement; and yet the tenant ſhall have a *quod ei deforceat*.

[*] 17 E. 3. 58. 29 E. 3. 42. F. N. B. 98. b. 12 H. 4. 4. 19 E. 2. Diſceit. 56. W. 2. cap. 3. 3 H. 4. fol. 1. W. 2. ca. 3. 9 E. 4. 16.

41 E. 3. 8. b. 2 H. 4. 2. 21 H. 6. 56. 44 E. 3. 42. Br. tit. quod ei deforc. 4 Paſch. 33 El. Rot. 1125, inter Ed. Elmer & El. ſa. feme, ten. en dower demandants, & Wil. Thacker ten. in quod ei deforceat. (Cro. Eliz. 263.)

As to the ſecond objection, that the defendant may have an attaint. Firſt it was utterly denied, of the other part, [f] that an attaint did lie in this caſe; for though it be taken by the oath of twelve men, yet it is but an enqueſt of office, whereupon no attaint did lye on either partie, as upon an enquirie of colluſion, although it be by one jurie, nor upon a verdict of *quale jus*. Secondly, admitting that an attaint did lie in that caſe, yet it followeth not *ex conſequenti*, that a *quod ei deforceat* did not lie; [g] for if an aſſiſe bee taken by default, a *quod ei deforceat* doth lie; and yet the partie may have an attaint; for this is no enqueſt of office, but a recognition by the recognitors of an aſſiſe, who were returned the firſt day, and not returned upon the awarding of the aſſiſe by default. And as to the ſecond objection, of this opinion was the whole court

[f] 33 E. 3. quod ei deforc. Pl. ult. F. N. B. 156. V. Flet. l. 5. c. 21. 48 E. 3. 19. 40 Aſſ. 23. 38 H. 6. 25. 39 H. 6. 1. F. N. B. 107. [g] 17 E. 2. Attaint. 69. 21 H. 6. 56. 34 H. 6. 12.

in *Edward Elmer's* caſe above mentioned. As to the third objection, that the dammages ſhould bee the principall, becauſe they were at the common law; that is an argument (ſay the other ſide) that they are more antient, but not that they are more principall; and treble dammages were not at the common law (for the common law never giveth more dammage than the loſſe amounteth unto), but are given by the ſtatute of *Gloceſter*; but the place waſted is worthier being in the realtie, than dammages that be in the perſonaltie: *Et omne majus dignum trahit ad ſe minus dignum, quamvis minus dignum ſit antiquius et à digniori debet fieri denominatio.* And it is confeſſed, that in an action of waſte againſt tenant for life, or for yeares, the place waſted is the principall, becauſe the ſtatute of *Gloceſter* doth give the place waſted and treble dammages at one time; for no prohibition or action of waſte lay againſt them at the common law; and in an action of waſte, if the defendant confeſſe the action, the plaintiffe may have judgement for the place waſted, and releaſe the dammages; which proveth (and ſo *Fitzherbert* collecteth) that the dammages are not the principall: for a man ſhall never releaſe the principall and have judgement of the acceſſorie: and an action of waſte againſt tenant for life is as reall as an action againſt tenant in dower. And as to the caſe of 9 *H.* 5. cited on the other ſide, it was anſwered, that it was an action in the *tenuit*, which is only in the perſonaltie, and then the releaſe of the one doth bar both; neither could ſummons and ſeverance lie in that caſe; [*h*] but in an action of waſte (in the *tenet*), either againſt tenant for life or for yeares, the releaſe of the one doth not barre the other; and in both thoſe caſes ſummons and ſeverance doth lie: and this point was alſo reſolved accordingly in *Edward Elmer's* caſe. But when theſe three points were reſolved by the court for the demandant, then the councell of the tenant moved in arreſt of judgement another point, viz. that the judgement was given upon a *nihil dicit*, which is alwayes after appearance, and not *per defaltam*; and thereupon judgement was ſtayed. (1)

(1 Cro. 414. Mo: 184. F. N. B. 107. c. 6 Rep. 8. b. 11 Rep. 5.)

34 H. 6. 7. Waſt. 50.

(10 Rep. 115. 1 Leo. 297. 6 Rep. 44.)

[*h*] 6 E. 3. 47. 48 E. 3. 19.

(2 Rep. 68. b. Ant. 139. a. 285. a.)

[356. a.]

But to returne to *Littleton*. Here he openeth a ſecret of law; for the cauſe of this remitter is, for that the tenant for life in this caſe might have a *quod ei deforceat*, for ſo *Littleton* ſaith: *iſſint que il poit aver quod ei deforceat*: Now it appeareth by our bookes, that the tenant for life at the common law was remedileſſe, becauſe he could not have (as hath beene ſayd) a writ of right; and conſequently the feme covert in this caſe could not bee remitted by the taking of an eſtate to her huſband and her, becauſe her right was remedileſſe, and could have no action. But when an act of parliament or a cuſtome doth alter the reaſon and cauſe thereof, thereby the common law it ſelfe is altered, if the act of parliament and cuſtome be purſued; for *Alterata cauſâ et ratione legis, alteratur et lex, et ceſſante cauſâ ſeu ratione legis ceſſat et lex*: as in this caſe the ſtatute of *W.* 2. giving remedie to this feme tenant for life, in this it giveth her abilitie to bee remitted, becauſe her right is not now remedileſſe, but ſhee hath an action to recover it.

(8 Rep. 62. 356. F. N. B. 155. b. 2 Inſt. 350.)

Vide for the caſes upon this ground, 14 H. 7. 11. per Fineux. 27 H. 8. 4. b. Aid. 35 H. 6. Gard. 72. 29 E. 3. 5. per Wilbie Cuſtome. Lib. 3. fol. 86. Juſtice Windham's caſe. a. & b.

And *Littleton* warily putteth his caſe, that the recoverie was had againſt the feme while ſhe was ſole; for there was a time when it was a queſtion, whether a recoverie beeing had by default againſt the huſband and wife, (the wife being tenant for life) the ſaid ſtatute

(1) [See Note 311.]

ſtatute gave a *quod ei deforceat* to the huſband and wife, for that the ſtatute gave it againſt tenant in dower and tenant for life, &c. and here the huſband is not tenant for life, but ſeiſed in the right of his wife, and therefore out of the ſtatute: and of this opinion is one [g] booke; but (*Apices juris non ſunt jura, et parùm differunt quæ re concordant*) the contrarie hath beene adjudged, and ſo that point is now in peace: and the like in caſe of recoit for him in reverſion. But if the huſband and wife loſe by default, and the huſband die, the wife ſhall not have a *quod ei deforceat*; for a *cui in vitâ* is given to her in that caſe by a former ſtatute, viz. *W.* 2. *cap.* 3. Theſe things are worthy of due obſervation, and points of excellent learning; and *Littleton* in our bookes ſpeakes of another kinde of *quod ei deforceat* at the common law, upon a diſſeiſin, which you may read. But now let us heare him in his booke.

[g] 6 E. 3. 38. 33 E. 3. Avowrie 255. 9 E. 3. 4. F. N. B. 156. a. 5 E. 3. 5. 2 E. 4. 13. F. N. B. 156. C. 33 H. 6. 46. 2 E. 4 11. 19 E. 4. 2.

. . . . . .

"*Le reverſion eſt diſcontinue, iſſint que il ne poit aver action de waſte.*" Here it appeareth, that when the reverſion is deveſted, the leſſor cannot have an action of waſte, becauſe the writ is, that the leſſee did waſte *ad exhæredationem* of the leſſor, and that inheritance muſt continue at the time of the action brought. And it is to bee obſerved, that in an action of waſte brought by the leſſor againſt the leſſee, the leſſee in reſpect of the privitie cannot plead generally, *riens en le reverſion*, viz. [h] that the leſſor hath nothing in the reverſion, but he muſt ſhew how and by what meanes the reverſion is deveſted out of him; and this holdeth (as hath been ſaid) betweene the leſſor and the leſſee: but if the grantee of a reverſion bringeth an action of waſte, the leſſee may plead generally, that he hath nothing in the reverſion. And yet in ſome ſpeciall caſes an action of waſte ſhall lie, albeit the leſſor had nothing in the reverſion at the time of the waſte done. As if tenant for life make a feoffment in fee upon condition, and waſte is done, and after the leſſee re-enter for the condition broken; in this caſe the leſſor ſhall have an action of waſte. And ſo if a biſhop make a leaſe for life or yeares, and the biſhop die, the leſſee, the ſee being void, doth waſte, the ſucceſſor ſhall have an action of waſte. So if leſſee for life be diſſeiſed, and waſte is done, the leſſee re-enter, an action of waſte ſhall be maintained againſt the leſſee; and ſo in like caſes: and yet in none of theſe caſes the plaintiffe in the action of waſte had any thing in the reverſion at the time of the waſte made; but theſe eſpeciall caſes have their ſeverall and eſpeciall reaſons, as the learned reader will eaſily finde out.

45 E. 3. 21. 44 E. 3. 34, 35. F. N. B. 60. 23 H. 8. tit. Waſt. Br. 138. (Cro. Car. 405. Ant. 327. a. 334. b.) [h] 46 E. 3. 20. 8 H. 6. 17. 30 H. 6. 7. (Ant. 54. a. Mo. 52.) (F.N.B. 112.b.) (Poſt. 362. a.)

Here note, that albeit the action be falſe and feigned, yet is the recoverie ſo much reſpected in law, as it worketh a diſcontinuance, [i] But if tenant for life ſuffer a common recoverie, or any other recoverie by covine and conſent betweene the tenant for life and the recoveror, this is a forfeiture of his eſtate, and he in the reverſion may preſently enter for the forfeiture. Since our author wrote, the ſtatute of 14 *El. cap.* 8. hath beene made concerning this matter, which is to be conſidered, [k] and hath beene well conſtrued and expounded, and needs not here to be repeated.

And it is to be obſerved, that although the diſcontinuance groweth by matter of record, yet the remitter may be wrought by matter *in paiis*: and of the reſidue of theſe two Sections ſufficient hath beene ſaid before.

[i] 5 Aſſ. pl. 3. 3 E. 3. Ent. Cong. 42. 15 E. 3. Age 95. 41 E. 3. 18. per Finchden. 22 E. 3. 2. b. Lib. 1. fol. 15. Sir Will. Pelham's caſe. 14 El. cap. 8. [k] Lib. 3. fol. 60. Lib. 1. f. 15.

[356. b.]

Sect. 676.

(2 Inſt. 343. F. N. B. 198. a.)

*ITEM, ſi le baron diſcontinua le terre de ſa feme, et puis repriſt eſtate a luy et a ſa feme, et al tierce perſon pur terme de lour vies, ou en fee, ceo * n'eſt un remitter a la feme, forſque quant a la moity; et pur l'auter moity el covient apres la mort ſon baron de ſuer un briefe de* cui in vitâ †.

ALSO, if the huſband diſcontinue the land of his wife, and after taketh backe an eſtate to him and to his wife, and to a third perſon for terme of their lives, or in fee, this is no remitter to the wife, but as to the moitie; and for the other moitie ſhee muſt after the death of her huſband ſue a writ of *cui in vitâ*.

"*CEO n'eſt remitter forſque quant al moitie, &c.*" Albeit there is authoritie in our bookes to the contrarie, yet the law is taken as *Littleton* here holdeth it, and as before it appeareth in the like caſe in this Chapter, and for the reaſon therein expreſſed. 44 E. 3. 17. 44 Aſſ. 2. 43 Aſſ. 3. Vid. Sect. 666.

Sect. 677.

ITEM, ſi le baron diſcontinue la terme ſa feme, et ala ouſter le mere, et le diſcontinuee leſſa meſme la terre al feme pur terme de ſa vie, et liver a luy ſeiſin; et puis le baron revyent, et agree a cel liverie de ſeiſin, ceo eſt un remitter a la feme: et uncore ſi la feme fuiſſoit ſole ul temps de le leas fait a luy, ceo ne ſerroit a luy un remitter. Mes entant que el fuit covert de baron al temps de la leas, et de le liverie de ſeiſin fait a luy, coment que el priſt ſolement le liverie de ſeiſin, ceo fuit un remitter a luy, pur ceo que feme covert ſerra adjudge ſicome enfant deins age en tiel cas, &c. Quære *en ceſt cas ſi le baron quant il revient, voil diſagree a le leas et livery de ſeiſin fuit a ſon feme en ſon abſence, ſi ‡ ceo ouſtera ſon feme de ſon remitter, ‖ ou nemy, &c.*

ALSO, if the huſband diſcontinue the land of his wife, and goeth beyond ſea, and the diſcontinuee let the ſame land to the wife for terme of her life, and deliver to her ſeiſin; and after the huſband commeth backe, and agreeth to this liverie of ſeiſin, this is a remitter to the wife: and yet if the wife had beene ſole at the time of the leaſe made to her, this ſhould not be to her a remitter. But inaſmuch as ſhe was covert baron at the time of the leaſe, and liverie of ſeiſin made unto her, albeit ſhee taketh only the liverie of ſeiſin, this was a remitter to her becauſe a feme covert ſhall be adjudged as an infant within age in ſuch a caſe, &c. *Quære* in this caſe if the huſband when hee comes backe, will diſagree to the leaſe and livery of ſeiſin made to his wife in his abſence, if this ſhall ouſte his wife of her remitter, or not, &c.

E V

* *n'eſt—eſt*, L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *ceo—jeo*, L. and M. and Roh.
‖ *ou nemy, &c.* not in L. and M. nor Roh. nor MSS.

15 E. 4. 1. b. 7 H. 4. 17. 1 H. 7. 16. b. 39 E. 3. 30. 27 H. 8. 24.

"*ET puis le baron revient, et agreea, &c.*" In this caſe the eſtate is in the feme covert preſently by the liverie before any agreement by the huſband; and of this opinion is *Littleton* in our bookes.

(4 Inſt. 146.)

"*Ala ouſter le mere.*" If hee had beene within the realme, it doth not alter the caſe.

"*Quære en ceſt caſe ſi le baron, &c.*" Here is a queſtion moved by *Littleton*, whether the diſagreement of the huſband ſhall ouſte the wife of her remitter. And it ſeemeth that the diſagreement ſhall not deveſt the remitter.

Firſt, becauſe the ſtate made to the wife which wrought the remitter is baniſhed and wholly defeated, and therefore no diſagreement of the huſband can deveſt the ſtate gained by the leaſe, which by the remitter was deveſted before.

Secondly, for that the law having once reſtored her antient and better right, will not ſuffer the diſagreement of the huſband to deveſt it out of her, and to revive the diſcontinuance, and reveſt the wrongfull eſtate in the diſcontinuee. [357. a.]

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in law.

41 E. 3. 18. (Plo. 114. b.)

And ſo it is for the ſame cauſes, if the wife ſurvive her huſband, ſhe cannot claime in by the purchaſe made during the coverture; but the law adjudgeth her in her better right. But if both eſtates

18 Eliz. Dier. 351.

be waiveable, there albeit the wife *priind facie* is remitted; yet after the deceaſe of her huſband ſhe may elect which of the eſtates ſhe will. As if lands be given to the huſband and wife, and their heires, the huſband make a feoffment in fee, the feoffee giveth the land to the huſband and wife and the heires of their two bodies, the huſband dieth; in this caſe the wife may elect which of the

(2 Rep. 37. 3 Rep. 26. b. 32. a. 2 Roll. Abr. 421, 422, 423. 9 Rep. 140. b. 2 Cro. 489. Ante 246. a 348. 3 Leon. 2.)

eſtates ſhee will; for both eſtates are waiveable, and her time of election and power of wayver accrewed to her firſt after the deceaſe of her huſband. If lands be given to a man and the heires females of his body, and he maketh a feoffment in fee, and take backe an eſtate to him and his heires, and dieth, having iſſue a daughter, leaving his wife *groſſement enſeint* with a ſonne and dieth, the daughter is remitted; and albeit the ſonne be afterward borne, he ſhall not deveſt the remitter. (1)

Sect. 678.

ITEM, ſi le baron diſcontinua les tenements ſon feme, et le diſcontinuee eſt diſſeiſie, et puis le diſſeiſour leſſa meſmes les tenements a le baron et a ſon feme pur terme de vie, ceo eſt un remitter a la feme. Mes ſi le baron et ſon feme fueront de covin ‡ et conſent

ALSO, if the huſband diſcontinue the lands of his wife, and the diſcontinuee is diſſeiſed, and after the diſſeiſor letteth the ſame lands to the huſband and wife for terme of life, this is a remitter to the wife. But if the huſband and his wife were of

‡ *et—ou*, L. and M. and Roh.

(1) [See Note 312.]

ſent que le diſſeiſin doit eſte fait, donques il n'eſt remitter a ſon feme, pur ceo que el eſt diſſeiſereſſe. Mes ſi le baron fuit de covin et conſent a le diſſeiſin, et nemy la feme, donque tiel leas fait al feme eſt un remitter, pur ceo que nul default fuit en la feme.

of covine and conſent that the diſſeiſin ſhould be made, then it is no remitter to his wife, becauſe ſhe is a diſſeiſereſſe. But if the huſband were of covin and conſent to the diſſeiſin, and not the wife, then ſuch leaſe made to the wife is a remitter, for that no default was in the wife.

"*ET puis le diſſeiſor leſſa meſme les tenements, &c.*" Note, ſo much are remitters favoured in law, that the ſtate made by the diſſeiſor (which commeth to the land by wrong, and upon whom the entry of the diſcontinuee is lawfull) doth remit the wife, and deveſteth all out of the diſcontinuee, albeit he hath a warrantie of the land. 18 E. 4. 2. b. (F. N. B. 98. c.)

"*Mes ſi le baron et feme fueront de covin et conſent, &c.*" Here it appeareth that covin and conſent of the huſband and wife doth hinder the remitter of the wife; for covine and conſent in many caſes to do a wrong, doth choak a meere right, and the ill manner doth make a good matter unlawfull. 18 E. 4. ubi ſupra. (3 Rep. 71.)

[357. b.] "*Covin*," *Covina*, commeth of the French word *Convine*, and is a ſecret aſſent determined in the hearts of two or more to the defrauding and prejudice of another. Pl. Com. 546. in Wimbiſhe's caſe. (Ant. 35. a. 4 Rep. 82. b. F. N. B. 98. d.)

A woman is lawfully intitled to have dower, and ſhe is of covine and conſent, that one ſhall diſſeiſe the tenant of the land, againſt whom ſhe may recover her lawfull dower, all which is done accordingly; the tenant may lawfully enter upon her, and avoid the recovery in reſpect of the covine. But if a diſſeiſor, intruder, or abator, doe endow a woman that hath lawfull title of dower, this is good, and ſhall binde him that right hath, if there were no ſuch covine or conſent before the diſſeiſin, abatement, or intruſion. 44 E. 3. 46. 11 H. 4. 60. 44 Aſſ. 29. 19 H. 8. 12. 18 H. 8. 5. 11 E. 4. 2. 7 H. 7. 11. (3 Rep. 78. Plo. 51. a. 54. Ant. 35. a.)

And ſo it is in all caſes where a man hath a rightfull and juſt cauſe of action; yet if he of covine and conſent doe raiſe up a tenant by wrong againſt whom he may recover, the covine doth ſuffocate the right, ſo as the recovery, though it be upon a good title, ſhall not binde or reſtore the demandant to his right. 41 Aſſ. p. 28. 25 Aſſ. p. 1. 27 Aſſ. 74. 15 E. 4. 4. a. 12 Aſſ. p. 10.

If tenant in taile and his iſſue diſſeiſe the diſcontinuee to the uſe of the father, and the father dieth, and the land deſcendeth to the iſſue, he is not remitted againſt the diſcontinuee in reſpect he was privie and partie to the wrong; but in reſpect of all others he is remitted, and ſhall deraigne the firſt warrantie. And ſo note a man may be remitted againſt one, and not againſt another. 11 E. 4. 2. 15 E. 4. 23. 14 H. 8. 13. 33 H. 6. 5. 12 E. 4. 21. b.

A. and *B.* joyntenants be intitled to a reall action againſt the heire of the diſſeiſor, *A.* cauſe the heire to be diſſeiſed, againſt whom *A.* and *B.* recover and ſue execution. *B.* is remitted, for that he was not partie to the covine, and ſhall hold in common with *A.*; but *A.* is not remitted, for the reaſon that *Littleton* here ſheweth.

"*Par*

F. N. B. 179. g. 12 E. 4. 9. 35 Aſſ. 5. 44 E. 3. 9. 23. 13 Aſſ. 1. Temps E. 1. Wake 128. 16 Aſſ. p. 7. 21 E. 4. 53. 21 H. 7. 35. 3 H. 4. 17. (1 Roll. Abr. 878. 660. F. N. B. 117. g.)

"Pur ceo que el eſt diſſeiſoreſſe." *Nota*, it is regularly true, that a feme covert cannot be a diſſeiſoreſſe by her commandement or procurement precedent, nor by her aſſent or agreement ſubſequent; but by her actuall entry, or proper act, ſhe may be a diſſeiſoreſſe. And therefore ſome doe hold that *Littleton* muſt be intended, that the huſband and wife were preſent when the diſſeiſin was done; and others doe hold that *Littleton* is good law, albeit ſhe were abſent; for that if her procurement or agreement be to doe a wrong, to cauſe a remitter unto her in this ſpeciall caſe, ſhe ſhall faile of her end, and remitted ſhe ſhall not be; but in this ſpeciall caſe ſhe ſhall be holden as a diſſeiſoreſſe by her covine and conſent *quatenus* to hinder the remitter. And here it appeareth, that albeit the huſband be of covine and conſent, &c.; yet if the wife were not of covine and conſent alſo, ſhe ſhall be remitted, becauſe, as *Littleton* ſaith, there was no default in the wife.

(4 Rep. 52.)

Sect. 679.

ITEM, ſi tiel diſcontinuee feſoit eſtate de franktenement al baron et a ſon feme per fait endent ſur condition, ſcilicet, *reſervant al diſcontinuee un certaine rent, et pur default de payment un re-entry, et pur ceo que le rent eſt aderere le diſcontinuee enter; donques de cel entrie le feme avera un aſſiſe de* novel diſſeiſin, *apres la mort ſon baron envers le diſcontinuee, pur ceo que le condition fuit tout ouſterment aniente, entant que la feme fuit en ſon remitter; uncore le baron oveſque ſa feme ne poient aver aſſiſe, pur ceo que le baron eſt eſtoppe, &c.*

ALSO, if ſuch diſcontinuee make an eſtate of freehold to the huſband and wife by deed indented upon condition, *ſcilicet*, reſerving to the diſcontinuee a certaine rent, and for default of payment a re-entrie, and for that the rent is behind the diſcontinuee enter; then for this entrie the wife ſhall have an aſſiſe of *novel diſſeiſin*, after the death of her huſband againſt the diſcontinuee, becauſe the condition was altogether taken away, inaſmuch as the wife was in her remitter; yet the huſband with his wife cannot have an aſſiſe, becauſe the huſband is eſtopped, &c. [358. a.]

Pl. Com. in Amy Townſhend's caſe. 12 R. 2. tit. Remitter, 18.

IT is hereby to be obſerved, that the wife is preſently remitted, and that the conditions, and rents, and all other things annexed to, or reſerved upon the ſtate (that is vaniſhed and defeated by the remitter) are defeated alſo. (1)

Sect. 680, 681.

(Sid. 69.) (Hob. 260.)

ITEM, ſi le baron diſcontinua les tenements ſa feme, et repriſt eſtate a luy pur terme de ſa vie, le remainder apres ſon deceaſe a ſa feme pur terme

ALSO, if the huſband diſcontinue the tenements of his wife, and take backe an eſtate to him for life, the remainder after his deceaſe to his

(1) [See Note 313.]

terme de ſa vie; en ceſt cas ceo n'eſt un remitter a la feme durant la vie le baron, pur ceo que durant la vie le baron, la feme n'ad riens en le franktenement. Mes ſi en ceo cas la feme ſurvesquiſt le baron, ceo eſt un remitter a la feme, pur ceo que un franktenement en ley eſt jecte ſur luy maugre le ſoen. * *Et entant que el ne poit aver action envers nul auter perſon, et envers luy meſme el ne poit aver action, pur ceo el eſt en ſon remitter. Car en ceſt cas, coment que la feme ne entra pas en les tenements, uncore un eſtrange que ad cauſe de aver action, poit ſuer ſon action envers la feme de meſmes les tenements, pur ceo que el eſt tenant en ley, coment que el ne ſoit tenant en fait.*

his wife for terme of her life; in this caſe this is no remitter to the wife during the life of the huſband, for that during the life of the huſband the wife hath nothing in the freehold. But if in this caſe the wife ſurviveth the huſband, this is a remitter to the wife, becauſe a freehold in law is caſt upon her againſt her will. And inaſmuch as ſhe cannot have an action againſt any other perſon, and againſt her ſelfe ſhee cannot have any action, therefore ſhe is in her remitter. For in this caſe, although the wife doth not enter into the tenements, yet a ſtranger which hath cauſe to have an action, may ſue his action againſt the wife for the ſame tenements, becauſe ſhee is tenant in law, albeit that ſhe be not tenant in deed.

Sect. 681.

(4 Rep. 8.) (Plo. 416. b.)

CAR tenant de franktenement en fait eſt celuy, que, s'il ſoit diſſeiſie de † franktenement, il poit aver aſſiſe: mes tenant de franktenement en ley devant ſon entre ‡ en fait, n'avera my aſſiſe. Et ſi home ‡ ſoit ſeiſie ‖ de certaine terre, § et ad iſſue fits quel prent
[358. b.] *feme, et le pier devie ſeiſie, et puis le fits devie devant aſcun entrie fait per luy en la terre, le feme le fits ſerra endowe en le terre, et uncore il n'avoit nul franktenement en fait, mes il avoit un fee et franktenement en ley. Et iſſint nota, que* præcipe quòd reddat *poit auxybien eſtre maintenus envers celuy que ad franktenement en ley, ſicome envers celuy que ad le franktenement en fait.*

FOR tenant of freehold in deed is he, who, if hee be diſſeiſed of the freehold, may have an aſſiſe: but tenant of freehold in law before his entrie in deed, ſhall not have an aſſiſe. And if a man bee ſeiſed of certaine land, and hath iſſue a ſonne who taketh wife, and the father dieth ſeiſed, and after the ſonne dies before any entrie made by him into the land, the wife of the ſonne ſhall be endowed in the land, and yet he had no freehold in deed, but hee had a fee and freehold in law. And ſo note, that a *præcipe quòd reddat* may as well bee maintained againſt him that hath the freehold in law, as againſt him that hath the freehold in deed.

HERE five things are to be obſerved. Firſt, that a remainder expectant upon an eſtate for life worketh no remitter, but when it fall in poſſeſſion: for before his time he can have no action, and (18 H. 8. 3. (8 Rep. 26. a.)

no

* *ſoen—ſeme*, Paper MS.
† *ſon* added L. and M. and Roh.
‡ *en fait* not in L. and M. nor Roh.
‡ *ſoit* not in L. and M. nor Roh.
‖ *en fee* added L. and M. and Roh.
§ *et* not in L. and M. nor Roh.

no freehold is in him. Secondly, though the woman might waive the remainder, yet becauſe ſhe is preſently by the death of the huſband tenant to the *præcipe*, it is within the rule of remitter, and her power of waiver is not materiall. Thirdly, that a freehold in law being caſt upon the woman by act of law, without any thing done or aſſented to by her, doth remit her, albeit ſhe be then ſole and of full age. Fourthly, that a *præcipe* lyeth againſt one that hath but a freehold in law. Fifthly, that a woman ſhall be endowed where the huſband hath the inheritance, and but a freehold in law, as hath beene ſaid in the Chapter of Dower.

Vide Sect. 447. Bracton Lib. 4. fol. 206. 237. Britton 83. b. Fleta lib. 3. cap. 15. (Plo. 229. b. 230. a. Cro. Car. 338. Hob. 256.)

Sect. 682.

*ITEM, ſi tenant en taile ad iſſue deux fits de pleine age, et il leſſa la terre taile al eigne fits pur terme de ſa vie, le remainder al fits puiſne pur terme de ſa vie, et puis le tenant en taile moruſt; en ceſt cas l'eigne fits n'eſt pas en ſon remitter, pur ceo que il prent eſtate de ſon pier. Mes ſi l'eigne fits moruſt ſauns iſſue de ſon corps, donque ceo eſt un remitter al puiſne frere, pur ceo que il eſt heire en le tayle, et un franktenement en le ley eſt eſcheate, et jecte ſur luy per force de le remainder, et il y ad nul envers que il poit ſuer ſon action *.*

ALSO, if tenant in taile hath iſſue two ſons of full age, and he letteth the land tailed to the eldeſt ſon for terme of his life, the remainder to the younger ſon for terme of his life, and after the tenant in taile dieth; in this caſe the eldeſt ſonne is not in his remitter, becauſe hee tooke an eſtate of his father. But if the eldeſt die without iſſue of his bodie, then this is a remitter to the younger brother, becauſe he is heire in taile, and a freehold in law is eſcheated, and caſt upon him by force of the remainder, and there is none againſt whom he may ſue his action.

[a] 12 E. 4. 20.

[b] Sect. 684, 685.

OF this opinion is [a] *Littleton* in our bookes; and of this ſufficient hath beene ſaid in the next Section before. See hereafter [b] ſome explanation hereof.

Sect. 683.

[359. a]

(2 Roll. Abr. 420.)

EN meſme le maner eſt, lou home ſoit diſſeiſie, et le diſſeiſor moruſt ſeiſie, et les tenements diſcendont a ſon heire, et l'heire le diſſeiſor fait un leas a un home de meſmes les tenements pur terme de † vie, le remainder a le diſſeiſee pur terme de vie, ou en taile, ou en fee, ‡ le tenant a terme de vie moruſt,

IN the ſame manner it is where a man is diſſeiſed, and the diſſeiſor dieth ſeiſed, and the tenements deſcend to his heire, and the heire of the diſſeiſor make a leaſe to a man of the ſame tenements for terme of life, the remainder to the diſſeiſee for terme of life, or in taile, or in fee, the

* &c. added L. and M. and Roh.
† *ſon* added L. and M. and Roh.
‡ *et* added in L. and M. and Roh.

moruſt, ore ceo eſt un remitter al diſſeiſee, &c. cauſâ quâ ſupra, ‡ *&c.*

the tenant for life dieth, now this is a remitter to the diſſeiſee, &c. *cauſâ quâ ſupra*, &c.

AND this ſtandeth upon the ſame reaſon that the caſes in the two Sections precedent doe. See the next Section following.

Sect. 684.

§* *NOTA, ſi tenant en taile enfeoffa ſon fits et un auter per ſon fait de la terre taile, en fee, et livery de ſeiſin eſt fait a l'auter accordant al fait,* ‖ *et le fits rien conuſant de ceo* ¶ *agreea a le feoffment, et puis celuy que priſt le livery de ſeiſin devy, et le fits ne occupia la terre, ne prent aſcun profit del terre durant la vie le pier, et puis le pier moruſt, ore ceo eſt un remitter al fits, pur ceo que le franktenement eſt jeĉt ſur luy per le ſurvivor; et nul default fuit en luy, pur ceo que il ne unque agreea, &c. en la vie ſon pier, et il ad nul envers que il poit ſuer briefe de* formedon, *&c.*

NOTE, if tenant in taile infeoffe his ſonne and another by his deed of the land intailed, in fee, and livery of ſeiſin is made to the other according to the deed, and the ſon not knowing of this agreeth not to the feoffement, and after hee which tooke the livery of ſeiſin dieth, and the ſon doth not occupie the land, nor taketh any profit of the land during the life of the father, and after the father dieth, now this is a remitter to the ſonne, becauſe the freehold is caſt upon him by the ſurvivor; and no default was in him, becauſe he did never agree, &c. in the life of his father, and hee hath none againſt whom hee may ſue a writ of *formedon*, &c.

*IT ſhould ſeeme by this marke, that this was an addition to *Littleton*; but it is of *Littleton*'s owne worke, and agreeth with the originall, ſaving the originall begun this Section thus: *Item ſi tenant en taile, &c.*

"*Per ſon fait, &c.*" Here *Littleton* materially addeth by his deed; for if a man intendeth to [*b*] make a feoffement by *parol* to *A.* and *B.* and he and *B.* come upon the land, *A.* being abſent, and make livery to *B.* in the name both of *B.* and *A.* and to their heires, this ſhall enure onely to *B.*; for neither can a man abſent take livery, nor make livery, without deed. (Ant. 49. b. 52. a. 297. b.) [*b*] Temps H. 8. Feoffements. Br. 72. 40 E. 3. 41. 10 E. 4. 1. a. 15 E. 4. 18. 18 E. 4. 12. 22 H. 6. 12.

"*Et liverie de ſeiſin eſt fait a l'auter accordant al fait, &c.*" Note, livery being made to one according to the deede, enureth to both, becauſe the deede whereunto the livery referreth is made to both; for the rule is, that *Verba relata hoc maximè operantur per referentiam ut in eis in eſſe videntur.* (9 Rep. 136.) (Ant. 49. b. 52. a.)

"*Et le fits nient conuſant de ceo, ne agreea a le feoffement.*" [359. b.] Here it appeareth, that if the ſonne be conuſant, and agreeth to

‡ *&c.* not in L. and M. nor Roh.
§ *Nota—item*, L. and M. and Roh.
‖ *et* not in L. and M. nor Roh.
¶ *ne* added L. and M. and Roh.

to the feoffement, &c. this is no remitter to him. And therefore if the feoffement were made by deed indented, and the ſonne with the other ſealeth the counterpart, and then the feoffor maketh livery to the other according to the deed, and the other dieth, the ſon is not remitted, becauſe he was conuſant of the feoffement, and agreed to the ſame; and *Littleton* ſaith in the caſe that he putteth, that there was no default in the ſon, becauſe he agreed not to the feoffement in the life of the father: and ſo it ſeemeth, that if *A.* be ſeiſed in taile, and have iſſue two ſons, and by deed indented betweene him of the one part, and the ſons of the other part, maketh a leaſe to the eldeſt for life, the remainder to the ſecond in fee, and dieth and the eldeſt ſon dieth without iſſue, the ſecond ſon is not remitted, becauſe he agreed to the remainder in the life of the father, or if the like eſtate had been made by parol, if in the life of the father the tenant for life had beene impleaded, and made default, and he in the remainder had beene received, and thereby agreed to the remainder, after the death of the father and the eldeſt ſon without iſſue, the ſecond ſon ſhould not be remitted, becauſe he agreed to the remainder in the life of the father; all which is well warranted by the reaſon yeelded by our author in this Section.

Vide Sect. 688.

Sect. 685.

CAR ſi home ſoit diſſeiſie de certaine terre, et le diſſeiſor fait un fait de feoffment per que il infeoffa B. C. *et* D. *et le liverie de ſeiſin eſt fait a* B. *et* C. *mes* D. *ne ſuit al liverie de ſeiſin, ne unque agreea a le feoffment, ne unque voile prender les profits, &c. et puis* B. *et* C. *devieront, et* D. *eux ſurveſquiſt, et le diſſeiſee port ſon briefe* ſur diſſeiſin en le per *envers D.* * *il monſtra tout le matter,* † *coment il ne unques agreea a le feoffment, et iſſint il diſchargera a luy de damages, iſſint que le demandant ne recovera aſcuns dammages envers luy, coment que il ſoit tenant del franktenement del terre. Et uncore le ſtatute de* Glouceſter, ‡ cap. 1. *voit, que le diſſeiſee recovera damages en briefe de* entre, *foundue ſur* § *diſſeiſin vers celuy que eſt trouve tenant. Et ceo eſt un proofe en l'auter caſe, que entant que l'iſſue en le taile avient a le franktenement, et* ‖ *nemy per ſon fait,*

FOR if a man be diſſeiſed of certaine land, and the diſſeiſour make a deed of feoffement whereby he infeoffeth *B. C.* and *D.* and liverie of ſeiſin is made to *B.* and *C.* but *D.* was not at the liverie of ſeiſin, nor ever agreed to the feoffment, nor ever would take the profits, &c. and after *B.* and *C.* die, and *D.* ſurvive them, and the diſſeiſee bringeth his writ upon diſſeiſin in the *per* againſt *D.* hee ſhall ſhew all the matter, how he never agreed to the feoffement, and hee ſhall diſcharge himſelf of dammages, ſo as the demaundant ſhall recover no dammages againſt him, although he be tenant of the freehold of the land. And yet the ſtatute of *Glouceſter, cap.* 1. will, that the diſſeiſee ſhall recover dammages in a writ of entrie founded upon a diſſeiſin againſt him which is found tenant. And this is a proofe in the other caſe [360. a]

* *il—meſme celuy* D. L. and M. and Roh.
† *et* added L. and M. and Roh.
‡ [illegible] and M. nor Roh.
§ *le novel* added L. and M. and Roh.
‖ *ceo* added L. and M. and Roh.

fait, ne per ſon agreement, † *mes apres la mort ſon pier, ceo eſt un remitter a luy, entant que il ne poit ſuer action de* formedon *envers nul auter perſon, &c.*

caſe that foraſmuch as the iſſue in taile came to the freehold, and not by his act, nor by his agreement, but after the death of his father, therefore this is a remitter to him, inaſmuch as he cannot ſue an action of *formedon* againſt any other perſon, &c.

THIS caſe ſtandeth upon the ſame reaſon that the next precedent caſe doth. (8 Rep. 1. Poſt. 365. b. 366. a. 369. 381. Ant. 11. b. 115. a. Plo. 365.)

"*Mes celuy que eſt trove tenant, &c.*" Here it appeareth, that acts of parliament are to be ſo conſtrued, as no man that is innocent, or free from injurie or wrong, be by a literall conſtruction puniſhed or endamaged: and therefore in this caſe, albeit the letter of the ſtatute is generally to give dammages againſt him that is found tenant, and the caſe that *Littleton* here putteth, *D.* being ſurvivor, is conſequently found tenant of the land; yet becauſe he waived the eſtate, and never agreed to the feoffinent, nor tooke any profits, he ſhall not be charged with the dammages.

Sect. 686, 687.

(2 Roll. Abr. 522.)

ITEM, ſi un abbe aliena la terre de ſon meaſon a un auter en fee, et l'alienee per ſon fait charge la terre ove un rent charge en fee, et puis l'alienee infeoffe l'abbe ove licence, a aver et tener al abbe et a ſes ſucceſſors a touts jours, et puis l'abbe moruſt, et un auter eſt eſlieu, et fait abbe: en ceſt caſe l'abbe que eſt le ſucceſſor, et ſon covent, ſont en lour remitter, et tiendront la terre diſcharge, pur ceo que meſme l'abbe ne poit aver aſcun action, ‡ *ne briefe* d'entre ſine aſſenſu capituli, *de meſme la terre envers nul auter perſon.* (1)

ALSO, if an abbot alien the land of his houſe to another in fee, and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee infeoffe the abbot with licence, to have and to hold to the abbot and to his ſucceſſors for ever, and after the abbot die, and another is choſen, and made abbot: in this caſe the abbot that is the ſucceſſor, and his covent, are in their remitter, and ſhall hold the land diſcharged, becauſe the ſame abbot cannot have an action, nor a writ of *entre ſine aſſenſu capituli*, of the ſame land againſt any other perſon.

Sect. 687.

EN meſme le maner eſt, lou un eveſque, ou un deane, ou auters tiels perſons aliena, &c. ſans aſſent, &c.

IN the ſame manner it is, where a biſhop or a deane, or other ſuch perſons alien, &c. without aſſent &c. and

† *mes—que*, L. and M. and Roh. ‡ *ne—de*, L. and M. and Roh.

(1) [See Note 314.]

&c. et l'alienee charge la terre, &c. et puis l'eveſque repriſt eſtate de meſme la terre per licence, a luy et a ſes ſucceſſors, et puis l'eveſque devie; ſon ſucceſſor eſt en ſon remitter, come en droit de ſon eſgliſe, et defeatera le charge, &c. cauſâ quâ ſupra, &c.

and the alienee charge the land, &c. and after the biſhop takes backe an eſtate of the ſame land by licence, to him and his ſucceſſours, and after the biſhop dieth; his [360. b] ſucceſſor is in his remitter, as in right of his church, and ſhall defeat the charge, &c. *cauſâ quâ ſupra.*

OUR author having ſpoken of remitters to ſingular or naturall perſons, as iſſues in taile, and to feme coverts, and to their heires, and to them in reverſion or remainder, and their heires; now he ſpeaketh of remitters to bodies politike and incorporate, as to abbots, biſhops, deanes, &c. And as diſcents doe remit the heire which comes in the *per*, ſo ſucceſſion doth remit the ſucceſſor, albeit he commeth in the *poſt*. And ſo in other caſes where the iſſue in taile of full age ſhall be remitted, there in the like caſe ſhall the ſucceſſor be remitted alſo, and defeat all meane charges and incumbrances.

"*Ove licence, &c.*" That is, of the king and the lords immediate and mediate, to diſpenſe with the ſtatutes of mortmaine; whereof ſee more before, *Sect.* 140.

Sect. 688.

ITEM, ſi home ſuiſt faux action envers le tenant en taile, ſicome home voile ſuer envers luy un briefe d'entre en le poſt, *ſuppoſant per ſon briefe que le tenant en taile n'ad pas entre ſinon per* A. *de* B. *que diſſeiſiſt l'ayel le demandant, et ceo eſt faux, et il recover envers le tenant en le taile per default, et ſuiſt execution, et puis le tenant en taile moruſt, ſon iſſue poit aver briefe de* formedon *envers luy que recovera; et s'il voile pleader le recoverie envers le tenant en taile, l'iſſue poit dire, que le dit* A. *de* B. *ne diſſeiſiſt poynt l'ayel celuy que recoveraſt, en le maner come ſon briefe ſuppoſa, et iſſint il fauxera* * *le recoverie. Auxy* poſito *que ceo fuit voyer, que le dit* A. *de* B. *diſſeiſiſt l'ayel le demandant que recoveraſt, et que apres le diſſeiſin le demandant, ou ſon pier, ou ſon ayel per un fait avoyent releſſe al tenant*

ALSO, if a man ſue a falſe action againſt tenant in taile, as if one will ſue againſt him a writ of entrie in the *poſt*, ſuppoſing by his writ that the tenant in taile had not his entrie but by *A.* of *B.* who diſſeiſed the grandfather of the demandant, and this is falſe, and he recovereth againſt the tenant in taile by default, and ſueth execution, and after the tenant in taile dieth, his iſſue may have a writ of *formedon* againſt him which recovereth; and if hee will plead the recoverie againſt the tenant in taile, the iſſue may ſay, that the ſaid *A.* of *B.* did not diſſeiſe the grandfather of him which recovered, in manner as his writ ſuppoſe, and ſo he ſhall falſifie his recovery. And admit this were true, that the ſaid *A.* of *B.* did diſſeiſe the grandfather of the demandant which recovered, and

* *h—yôn*, L. and M. and Roh.

tenant en taile tout le droit que il avoit en la terre, &c. et ceo nient contrifteant il fuift un briefe [361, a.] d'entre en le poſt *envers le tenant en taile, en le manner come eſt avauntdit, et le tenaunt en taile pleda a celuy, que le dit A. de B. ne diſſeiſiſt pas ſon ayel, en le manner come ſon briefe ſuppoſa; et ſur ceo ſont a iſſue, et l'iſſue eſt trove pur le demandant, per que il ad judgement de recover, et ſuiſt execution; et puis le tenant en le taile moruſt, ſon iſſue poit avoir un briefe de* formedon *envers celuy que recovera; et s'il voile plead le recoverie per l'action trie envers ſon pier* * *que fuit tenant en taile, donque il poit monſtrer et pleader le releaſe fait al ſon pier, et iſſint l'action que fuit ſue, feint en ley* †.

and that after the diſſeiſin, the demandant, or his father, or his grandfather by a deed had releaſed to the tenant in taile all the right which hee had in the land, &c. and notwithſtanding this hee ſueth a writ of entrie in the *poſt* againſt the tenant in taile, in manner as is aforeſaid, and the tenant in taile plead to him, that the ſaid *A.* of *B.* did not diſſeiſe his grandfather, in ſuch manner as his writ ſuppoſe; and upon this they are at iſſue, and the iſſue is found for the demandant, wherby he hath judgment to recover, and ſueth execution; and after the tenant in taile dieth, his iſſue may have a writ of *formedon* againſt him that recovered; and if he will plead the recovery by the action tried againſt his father who was tenant in taile, then he may ſhew and plead the releaſe made to his father, and ſo the action which was ſued, feint in law.

"*IL recovera envers le tenant en taile per default.*" *Littleton* addeth (by default) becauſe if the [c] recovery paſſed upon an iſſue tried by verdict, he ſhall never falſifie in the point tried, becauſe an attaint might have beene had againſt the jurors; and albeit all the jurors be dead, ſo as the attaint doe faile, yet the iſſue in taile ſhall not falſifie in the point tried, which, untill it be lawfully avoided, *pro veritate accipitur.* As if the tenant in taile be impleaded in a *formedon*, and he traverſeth the gift, and it is tried againſt him, and thereupon the demandant recover; in this caſe the iſſue in taile ſhall not falſifie in the point tried; but he may falſifie the recovery by any other matter: as that the tenant in taile might have pleaded a collaterall warrantie, or a releaſe, as *Littleton* here putteth the caſe, or to confeſſe and avoid the point tried. And *Littleton*'s caſe holdeth not only in a recovery by default, whereof he ſpeaketh, but alſo upon a *nihil dicit*, or confeſſion or demurrer.

[c] 12 E. 4. 19. 13 E. 4. 3. 11 H. 4. 89. 7 H. 4. 17. 14 H. 7. 10, 11. 28 Aſſ. 32, 52. 34 Aſſ. 7. 10 H. 6. 5. 19 H. 6. 39. brooke tit. Fauxifier de Recoverie 55. 22 H. 6. 28. 34 H. 6. 2. 26 H. 6. 32. 36 H. 6. Fauxer. de Recoverie 27.

(6 Rep. 7. 1 Roll. Rep. 443.)

Sect. 689.

ET il ſemble, que feint action eſt autant a dire en Engliſh, a fained action, *c'eſtaſcavoir, tiel action que coment que les parolx de le briefe ſont voyers, uncore per certaine cauſes il n'ad cauſe ne title per la ley de recover per*

AND it ſeemeth, that a faint action is as much to ſay in Engliſh, *a fained action*, that is to ſay, ſuch an action as albeit the words of the writ be true, yet for certaine cauſes hee hath no cauſe nor title by the law to recover

* *que fuit* not in L. and M. nor Roh.

† *&c.* added L. and M. and Roh.

*per meſme l'action. Et faux action eſt, lou les parolx de briefe ſont faux. Et en les deux caſes avantdits, ſi le cas fuit tiel, que apres tiel recovery, et execution ent fait, le tenant en taile eſt diſſeiſie celuy que recovera, et ent moruſt ſeiſie, per que la terre diſcendiſt a ſon iſſue, ceo eſt un remitter al iſſue, et l'iſſue eſt eins per force de le taile; et pur cel cauſe jeo aye mis les deux caſes precedents, pur enformer toy, mon fits, que l'iſſue en taile per force d'un diſcent fait a luy apres un recovery et execution * fait envers ſon auncеſter, poit eſtre auxy bien en ſon remitter, ſicome il ſerroit per le diſcent fait a luy apres un diſcontinuance fait per ſon auncеſter de les terres tayles per feoffement en pais, ou quterment, &c.*

recover by the ſame action. And a falſe action is, where the words of the writ bee falſe. And in theſe two caſes aforeſaid, if the caſe were ſuch, that after ſuch recovery, and execution thereupon done, the tenant in tayle had diſſeiſed him that recovered, and thereof died ſeiſed, whereby the land deſcended to his iſſue, this is a remitter to the iſſue, and the iſſue is in by force of the taile; and for this cauſe I have put theſe two caſes precedent, to enforme thee (my ſonne) that the iſſue in taile by force of a diſcent made unto him after a recovery and execution made againſt his anceſtour, may be as well in his remitter, as he ſhould be by the diſcent made to him after a diſcontinuance made by his anceſtour of the entayled lands by feoffement in the countrie, or otherwiſe, &c. [361. b.

HERE *Littleton* explaineth what a faint action is, and what a falſe action is, which is plaine and perſpicuous. And here it is to be obſerved, that a remitter may be had after a recovery upon a faint action by a diſſeiſin and a diſcent, aſwell as by a diſcent after a diſcontinuance by a feoffement, &c,

Sect. 690.

ITEM, en les caſes avantdits, ſi le cas fuit tiel, que apres ceo que le demandant avoit judgement de recover envers le tenant en taile, et meſme le tenant en taile moruſt devaunt aſcun execution ewe envers luy, per que les tenements diſcendont a ſon iſſue, et celuy que recovera ſuiſt un ſcire facias *hors de le judgement d'aver execution de le judgement envers l'iſſue en taile, l'iſſue pledera le matter come avaunt eſt dit; et iſſint prova que le † dit recovery fuit faux ou feint en ley, et iſſint luy barrera d'aver execution de le judgement ‡.*

ALSO, in the caſes aforeſaid, if the caſe were ſuch, that after that the demandant have judgement to recover againſt the tenant in tayle, and the ſame tenant in tayle dieth before any execution had againſt him, whereby the tenements deſcend to his iſſue, and he who recovereth ſueth a *ſcire facias* out of the judgement to have execution of the judgement againſt the iſſue in taile, the iſſue ſhal plead the matter as aforeſaid; and ſo prove that the ſaid recovery was falſe or faint in law, and ſo ſhall barre him to have execution of the judgement.

* *ent* added L. and M. and Roh.
† *dit* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.

HERE

HERE it appeareth, that if a judgement be given againſt a tenant in taile upon a faint or falſe action, and tenant in taile die before execution, no execution can be ſued againſt the iſſue in tayle. But if in a common recoverie judgement bee had againſt tenant in tayle where he voucheth, and hath judgement to recover over in value, albeit the tenant in tayle dyeth before execution, yet the recoveror ſhall execute the judgement againſt the iſſue in tayle in reſpect of the intended recompence; and for that it is the common aſſurance of the realme, and is well warranted [d] by our bookes, and was not invented by juſtice *Choke*, who was a grave and learned judge in the time of *E.* 4. (as ſome hold by tradition); but it may [362. a.] bee that it was upon former authorities and opinions of judges diſcovered by him, aſſented unto by the reſt of the judges.

28 Aſſ. 32. 34 Aſſ. pl. 7. 15 E. 3. Age 95. 11 H. 4. 89. 7 H. 4. 17. 38 E. 3. Entrie Cong. 32. 21 H. 6. 13. 10 H. 6. 6. 12 E. 4. 20. 14 H. 7. 11. 23 Eliz. Dier 376. Lib. 1. fol. 106. Shelley's caſe. Pl. Com. 55.

(Cro. Car. 388. Plo. 14.) See hereafter Sect. 709. 15 E. 3. Briefe 324. 42 E. 3. 56. 44 E. 3. 21. 48 E. 3. 11. 1 E. 4. 5. 5 E. 4. 2. [d] 12 E. 4. 20. Dier 23 Eliz. 376. Lib. 10. fol. 37, 38. in Mary Portington's caſe.

If a recoverie bee had againſt tenant for life without conſent or covine, though it be without title, and execution be had, and tenant for life dieth, the reverſion or remainder is diſcontinued, ſo as he in the reverſion or remainder cannot enter; but if ſuch a recovery be had by agreement and covine betweene the demandant and the tenant for life, then, as hath beene ſaid, it is a forfeiture of the eſtate for life, and he in the reverſion or remainder may enter for the forfeiture. So it is if the tenant for life ſuffer a common recovery at this day, it is a forfeiture of his eſtate; for a common recovery is a common conveyance or aſſurance, whereof the law taketh knowledge. Since *Littleton* wrote, there were two ſtatutes [e] made for preſervation of remainders and reverſions expectant upon any manner of eſtate for life; the one in 32 *H.* 8. the other in 14 *Eliz.*; but 32 *H.* 8. extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14 *Eliz.* and full remedie provided for preſervation of the entrie of them in reverſion or remainder. But the ſtatute of 14 *Eliz.* extendeth not to any recovery, unleſſe it be by agreement or covine. Secondly, [f] if there be tenant for life, remainder in taile, the reverſion or remainder in fee, if tenant for life be impleaded by agreement, and he vouche tenant in taile, and he vouch over the common vouchee, this ſhall barre the reverſion or remainder in fee, although he in the reverſion or remainder did never aſſent to the recovery; becauſe it was not the intent of the act to extend to ſuch a recovery, in which a tenant in taile was vouched; for he hath power by common recovery, if he were in poſſeſſion, to cut off all reverſions and remainders. And ſo if tenant for life had ſurrendred to him in remainder in taile, he might have barred the remainders and reverſions expectant upon his eſtate. Thirdly, where the proviſo of that act ſpeaketh of an aſſent of record by him in reverſion or remainder, it is to be underſtood, that ſuch aſſent muſt appeare upon the ſame record, either upon a voucher, *aid prier*, receit, or the like; for it cannot appeare of record, unleſſe it be done in courſe of law, and not by any extrajudiciall entrie, or by *memorandum*.

5 Aſſ. 3. 5 E. 3. Entre Cong. 42. Li. 1. fol. 15, 16. Sir William Pelham's caſe. (6 Rep. 8. b. Ant. 356. a.)

[e] 32 H. 8. cap. 31. 14 Eliz. cap. 8. (Sect. 675. 10 Rep. 49.)

[f] Lib. 3. fol. 60, 61. Lincolne Colledge caſe.

(2 Roll. Abr. 23. 146.)

Sect. 691.

ITEM, ſi tenant en taile diſcontinua le taile, et moruſt, et ſon iſſue port ſon briefe de formedon *envers le diſcontinuee (eſteant tenant de franktenement del terre) et le diſcontinuee pleda que il n'eſt tenant, mes ouſterment diſclaima de le tenancy en la terre; en ceſt cas le judgement ſerra, que le tenant alaſt ſans jour, et apres tiel judgement l'iſſue en le taile que eſt demandant poit entrer en la terre, nyent contriſteant le diſcontinuance, et per tiel entrie il ſerra adjudge eins en ſon remitter. Et la cauſe eſt, pur ceo que ſi aſcun home ſuiſt* præcipe quòd reddat *envers aſcun tenant de franktenement, en quel action le demandant ne recovera damages, et le tenant pledaſt nontenure, * ou auterment diſclaima en le tenancie, le demandant ne poit averrer ſon briefe, † et dirra que il eſt tenant, come le briefe ſuppoſe. Et pur cel cauſe le demandant apres ceo que judgement eſt done que le tenant alaſt ſans jour, poit entrer en les tenements demands, le quel ſerra auxy graund advantage a luy en ley, ſicome il avoit judgement de recoverer envers le tenant, et per tiel entrie il eſt en ſon remitter per force del taile. Mes lou le demandant recovera dammages envers le tenant, la le demandant poit averer, que il eſt tenant, come le briefe ſuppoſe, et ceo pur l'advantage del demandant pur recoverer ſes damages, ou auterment il ne recoveroit ſes damages, queux ſont ‡ ou ſueront a luy dones per la ley.*

ALSO, if tenant in taile diſcontinue the taile, and dieth, and his iſſue bringeth his writ of *formedon* againſt the diſcontinuee (being tenant of the freehold of the land) and the diſcontinuee plead that he is not tenant, but utterly diſclaymeth from the tenancy in the land; in this caſe the judgement ſhall be, that the tenant goeth without day, and after ſuch judgement the iſſue in the taile that is demandant may enter into the land, notwithſtanding the diſcontinuance, and by ſuch entrie hee ſhall be adjudged in his remitter. And the reaſon is, for that if any man ſue a *præcipe quòd reddat* againſt any tenant of the freehold, in which action the demandant ſhall not recover damages, and the tenant pleads nontenure, or otherwiſe diſclaime in the tenancie, the demandant cannot averre his writ, and ſay that hee is tenant, as the writ ſuppoſeth. And for this cauſe the demandant after that judgement is given that the tenant ſhall goe without day, may enter into the tenements demanded, the which ſhall bee as great an advantage to him in law, as if he had judgement to recover againſt the tenant, and by ſuch entry hee is in his remitter by force of the entaile. But where the demandant ſhall recover damages againſt the tenant, there the demandant may averre, that he is tenant, as the writ ſuppoſeth, and that for the advantage of the demandant to recover his dammages, or otherwiſe hee ſhall not recover his dammages, which are or were given to him by the law.

(Doct. Pla. 133.) 5 E. 4. 1. 36 H. 6. 29. 6 E. 3. 8. 4 E. 4. 38. (3 Rep. 26.)

HERE it appeareth, that upon the plea of nontenure, or of diſclaimer of the tenant in a *formedon* in the diſcender, albeit the expreſſe judgement be that the tenant ſhall goe without day, yet in judgement of law the demandant may enter according to the title of

* *ou—mes*, L. and M. and Roh.
† *et dirra*, not in L. and M. nor Roh.
‡ *ou ſueront* not in L. and M. nor Roh.

of his writ, and bee ſeiſed in tayle, notwithſtanding the diſcontinuance. And here, *Littleton* ſaith, the demandant ſhall be adjudged in his remitter; where hee taketh remitter in a large ſenſe: for in this caſe the demandant hath not two rights, but hath onely one antient right, and reſtored to the ſame by courſe of law; and ſo remitter here is taken for a recontinuance of the right.

Non-tenure. Vide Bracton, lib. 5. fol. 431, 432 & 414. Britton, cap. 84.

[362. b.] *" Ou le demandant ne recovera damages."* Here is to bee obſerved, that in ſuch a *præcipe* where the demandant is to recover dammages, if the tenant pleade non-tenure or diſclaime, [*f*] there the demandant may averre him to be tenant of the land, as his writ ſuppoſe for the benefit of his damages, which otherwiſe hee ſhould loſe, or pray judgement and enter. [*g*] But where no damages are to bee recovered, as in a *formedon* in the diſcender, and the like, there hee cannot averre him tenant, but pray his judgement and enter, for thereby hee hath the effect of his ſuite: *Et fruſtrà fit per plura, quod fieri poteſt per pauciora.*

7 H. 6. 17. 5 E. 4. 1. (5 Rep. 68.

[*f*] 13 H. 7. 22. 36 H. 6. 29. 22 H. 6. 44. 4 E. 4. 38. 5 E. 4. 1. 6 E. 3. 8. (7 Rep. 40.)

[*g*] 8 E. 3. 434. 24 E. 3. 9. 11 H. 4. 16. & Doct. Pla. 49.)

" Averrer." To averre or avouch, or verifie, *verificare*, whereof commeth *verificatio*, an averment; and is ſo ſaid as well in Engliſh as in French; and is two-fold, viz. generall and particular. A generall avermant, which is the concluſion of every plea to the writ, or in barre of replications and other pleadings (for counts or avowries in nature of counts need not bee averred) containing matter affirmative, ought to bee averred, *et hoc paratus eſt verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in taile, are averred; and there, tho' this word (*verificare*) be not uſed, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the forme thereof.

(Ant. 303. a.)

" Que le tenant alaſt ſans jour." *Quòd tenens eat ſine die.* This is the entrie of the judgement in that caſe, that the tenant ſhall goe without day, that is, to be diſcharged of further attendance; and this is ſometime finall for that action, whereof *Littleton* here putteth an example; and ſometime temporarie, whereof *Littleton* alſo hath put an example: as when excommengement is pleaded in diſabilitie of the plaintiffe or demandant, there the award is, that the tenant or defendant ſhall goe without day; and yet when the demandant or plaintiffe have purchaſed his letters of abſolution, upon ſhewing them to the court, he may have a reſommons or reattachment to recontinue the cauſe againe. But it is to be knowne, that when judgement is given for the tenant or defendant upon a plea in barre, or to the writ, &c. the judgement is all one, viz. *quod tenens*, or *defendens eat inde ſine die*, and ſhall have reference to the nature and matter of the plea, and ſo be taken either to goe in barre, or to the writ. So when judgement is given againſt the plaintiffe, either in barre of his action, or in abatement of his writ, &c. the judgement is all one, viz. *nihil capiat per breve*; and it appeareth by the record whether the plea did goe in barre, or to the writ. And the cauſe of the judgement is never entred in the record in any caſe; for that upon conſideration had of the record it appeareth therein.

[363. a]

(9 Rep. 7. Sid. 265. 318.)

Vide Sect. 201. (8 Rep. 68.)

3 H. 4. 2. 11.

(Ant. 135. b.)

Sect. 692.

(F. N. B. 192. b. 1 Roll. Abr. 631. Doct. Pla. 133.) (3 Lev. 330.)

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor devy, ſon heire eſteant eins per diſcent, ore l'entrie de le diſſeiſee eſt tolle; et ſi le diſſeiſee porta ſon briefe d'entrie ſur diſſeiſin en le per, envers l'heire, et l'heire diſclaime en le tenancy, &c. le demandant poit averer ſon briefe que il eſt tenant come le briefe ſuppoſe, s'il voit, pur recoverer ſes damages: mes uncore s'il voit relinquiſher le averment, &c. il poit loyalment entrer en la terre per cauſe del diſclaimer, nient obſtant que ſon entrie adevant fuit tolle. Et ceo fuit adjudge devant mon maſter ſir R. Danby, *jades chiefe juſtice de la common banke et ſes compagnions, &c.*

ALSO, if a man be diſſeiſed, and the diſſeiſor die, his heire being in by diſcent, now the entrie of the diſſeiſee is taken away; and if the diſſeiſee bring his writ of entrie *ſur diſſeiſin* in the *per*, againſt the heire, and the heire diſclaime in the tenancie, &c. the demandant may averre his writ that hee is tenant as the writ ſuppoſe, if he will, to recover his dammages: but yet if hee will relinquiſh the averment, &c. he may lawfully enter into the land becauſe of the diſclaimer, notwithſtanding that his entrie before was taken away. And this was adjudged before my maſter ſir *R. Danby*, late chiefe juſtice of the common place and his companions, &c.

"*ITEM, ſi home ſoit diſſeiſie, &c.*" Albeit in this caſe, and in the caſe before, the entrie of the demandant is his owne act, and the demandant hath no expreſſe judgement to recover, yet ſhall he be remitted; becauſe he in judgement of the law ſhall be in according to the title of his writ, and by his entrie defeat the diſcontinuance, and conſequently is remitted to his antient eſtate.

36 H. 6. f. 29.

"*Sir Robert Danby*," knight, was a gentleman of an ancient and faire deſcended family, and chiefe-juſtice of the court of common-pleas; a grave, reverend, and learned judge, of whom our author ſpeaketh here with verie great reverence, as you may perceive. And here is to be noted how neceſſarie it is, after the example of our author, to obſerve the judgements and reſolutions of the ſages of the law.

5 E. 4. 41.
4 E. 4. 38.

Sect. 693. [363. b.]

*ITEM, lou l'entry d'un home eſt congeable, coment que il prent eſtate a luy quant il eſt de pleine age pur terme de vie, ou en taile, ou en fee, ceo eſt un remitter a luy, ſi tiel priſel de eſtate ne ſoit per fuit indent, ou per matter de record, que * concludera ou eſtoppera.*

ALSO, where the entrie of a man is congeable, although that he takes an eſtate to him when hee is of full age for terme of life, or in taile, or in fee, this is a remitter to him, if ſuch taking of the eſtate be not by deed indented, or by matter of

* *luy* added L. and M. and Roh.

eſtoppera. Car ſi home ſoit diſſeiſie, et † reprent eſtate de le diſſeiſor ſans fait, ou per fait polle, ceo eſt ‡ un remitter al diſſeiſee, ‖ &c.

of record, which ſhall conclude or eſtop him. For if a man be diſſeiſed, and takes backe an eſtate from the diſſeiſor without deed, or by deed poll, this is a remitter to the diſſeiſee, &c.

HERE appeareth a diverſitie betweene a right of entrie and a right of action; for if a man of full age having but a right of action, taketh an eſtate to him, hee is not remitted: but where hee hath a right of entrie, and taketh an eſtate, he by his entrie is remitted, becauſe his entrie is lawfull. And if the diſſeiſor infeoffe the diſſeiſee and others, the diſſeiſee is remitted to the whole, for his entrie is lawfull: otherwiſe it is if his entrie were taken away. 29 Aſſ. p. 26. 43 Aſſ. p. 3. 11 H. 7. 20. 3 H. 6. 19. 40 E. 3. 43. (Sect. 683.) (Hob. 256.) (Ant. 49. b. 350. a.)

"*Lou l'entrie eſt congeable.*" *A.* is diſſeiſed of a mannor, whereunto an advowſon is appendant, an eſtranger uſurpe to the advowſon, if the diſſeiſee enter into the mannor, the advowſon is recontinued againe, which was ſevered by the uſurpation. And ſo it is if tenant in tayle be of a mannor whereunto an advowſon is appendant, the tenant in taile diſcontinueth in fee, the diſcontinuee granteth away the advowſon in fee, and dieth, the iſſue in tayle recontinueth the mannor by recoverie, he is thereby remitted to the advowſon; and in both caſes hee that right hath ſhall preſent when the church becommeth voyd. 8 R. 2. Quar. imp. 199. 19 H. 6. 30. 8 H. 6. 17. 21 H. 6. 2. 3 H. 4. 8. 14 H. 6. 15, 16. 37 H. 6. 18. 26 H. 8. 4. F. N. B. 36. f. & 35. b. (3 Rep. 3. b. Sect. 661.)

The patron of a benefice is outlawed, and the church becommeth voyd, an eſtranger uſurpeth, and ſix moneths paſſe, the king doth recover in a *quare impedit*, and remove the incumbent, &c. the advowſon is recontinued to the rightfull patron. And ſo note a diverſitie betweene a recontinuance and a remitter; for a remitter cannot be properly, unleſſe there be two titles; but a recontinuance may be where there is but one. 22 Aſſ. p. 33. en le caſe de Theobald Grimvile. (3 Rep. 3.)

"*Per fait indent, &c.*" Here it appeareth that if the diſſeiſor by deed indented make a leaſe for life, or a gift in taile, or a feoffment in fee, whereunto liverie of ſeiſin is requiſite; yet the deed indented ſhall not ſuffer the liverie made according to the forme and effect of the indenture, to worke any remitter to the diſſeiſee, but ſhall eſtop the diſſeiſee to claime his former eſtate; and if the diſſeiſor upon the feoffment doth reſerve any rent or condition, &c. the rent or condition is good: and the reaſon wherefore a deed indented ſhall conclude the taker more than the deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and leſſor; but the deed indented is the deed of both parties, and therefore aſwell the taker as the giver is concluded. 13 H. 4. 5. 3 H. 4. 17. 8 H. 4. 8. 12 H. 4. 19. 35 Aſſ. 8. 17 Aſſ. 3. 29 Aſſ. 53. 43 E. 3. 17. Parker's caſe. 44 E. 3. Eſtop. 10. 21 H. 6. 2. per Paſton. 8 H. 6. 17. per Cotiſmere. (1 Roll. Abr. 865. 878. 4 Rep. 52.)

"*Ou per record.*" As by fine, deed indented, and inrolled, and the like.

† *reprent—ent prent*, L. and M. and Roh. ‖ *&c.* not in L. and M. nor Roh.
‡ *un—bon*, L. and M. and Roh.

Sect. 694.

[364. a.]

*ITEM, ſi home leſſa terre pur terme de vie a un auter, le quel aliena a un auter en fee, et l'alienee fait eſtate a le leſſor, ceo eſt un remitter al leſſor, pur ceo que ſon entrie fuit congeable, * &c.*

ALSO, if a man let land for terme of life to another, who alieneth to another in fee, and the alienee make an eſtate to the leſſor, this is a remitter to the leſſor, becauſe his entrie was congeable, &c.

This is evident enough upon that which hath beene ſaid.

(Hob. 256.)

Sect. 695.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor leſſa la terre al diſſeiſee per fait pol, ou ſans fait, pur terme des ans, per que le diſſeiſee entra, ceſt entre eſt un remitter a le diſſeiſee. Car en tiel caſe lou l'entre d'un home eſt congeable, et un leaſe eſt fait a luy, coment que il claima per parolx en paiis, que il ad eſtate per force de tiel leaſe, ou dit overtment, que il ne claima riens en la terre ſinon per force de tiel leaſe, uncore ceo eſt un remitter a luy, car tiel † diſclaimer en le paiis n'eſt riens a purpoſe. Mes ſ'il ‡ diſclaimer en court de record, que il ‖ n'ad eſtate forſque per force de tiel leaſe, et nemy auterment, donque il eſt conclude, &c.

ALSO, if a man bee diſſeiſed, and the diſſeiſor let the land to the diſſeiſee by deed pol, or without deed, for terme of yeares, by which the diſſeiſee entreth, this entrie is a remitter to the diſſeiſee. For in ſuch caſe where the entrie of a man is congeable, and a leaſe is made to him, albeit that he claimeth by words *in paiis*, that he hath eſtate by force of ſuch leaſe, or ſaith openly, that he claimeth nothing in the land but by force of ſuch leaſe, yet this is a remitter to him, for that ſuch diſclaimer *in paiis* is nothing to the purpoſe. But if hee diſclaime in court of record, that he hath no eſtate but by force of ſuch leaſe, and not otherwiſe, then is he concluded, &c.

(3 Rep. 26.)

HERE appeareth a diverſitie betweene a claime *in paiis* of an eſtate, and a claime of record, for a claime *in paiis* ſhall not hinder a remitter. Otherwiſe it is of a claime of record, becauſe that doth worke a concluſion.

Sect. 696.

ITEM, ſi deux joyntenaunts ſeiſie de certaine tenements en fee, l'un eſteant le pleine age, l'auter deins age, ſont

ALSO, if two joyntenants ſeiſed of certaine tenements in fee, the one being of full age, the other within

* *&c.* not in L. and M. nor Roh.
† *diſclaimer—clayme*, L. and M. and Roh.
‡ *diſclaimer—clayms*, L. and M. and Roh.
‖ *n'ad—ad*, L. and M. and Roh.

*ſont diſſeiſies, * &c. et le diſſeiſor moruſt ſeiſie, et ſon iſſue entra, l'un de les joyntenants eſteant adonques deins age, et apres que il vient al pleine age, l'heire le diſſeiſor leſſa les tenements a meſmes les joyntenants pur terme de lour † deux vies, ceo eſt un remitter (quant al moitie) a celuy que fuit deins age, pur ceo que il eſt ſeiſie de ceſt moitie que affiert a luy en fee, pur ceo que ſon entre fuit congeable. Mes l'auter jointenaunt n'ad en l'auter moitie forſque eſtate pur terme de ſa vie per force de le leaſe, pur ceo que ſon entre fuit tolle, &c.*

within age, bee diſſeiſed, &c. and the diſſeiſor die ſeiſed, and his iſſue enter, the one of the joyntenants being then within age, and after that he commeth to full age, the heire of the diſſeiſor letteth the tenements to the ſame joyntenants for terme of their two lives, this is a remitter (as to the moitie) to him that was within age, becauſe hee is ſeiſed of the moitie which belongeth to him in fee, for that his entrie was congeable. But the other joyntenant hath in the other moity but an eſtate for terme of his life by force of the leaſe, becauſe his entry was taken away, &c.

HERE note a diverſitie worthy the obſervation, that where joyntenants or coparceners have one and the ſame remedie, if the one enter, the other ſhall enter alſo: but where remedies bee ſeverall, there it is otherwiſe. As if two joyntenants or coparceners joyne in a reall action, where their entrie is not lawfull, and the one is ſummoned and ſevered, and the other purſueth and recovereth the moitie, the other joyntenant or coparcener ſhall enter and take the profits with her, becauſe their remedie was one and the ſame. But where two coparceners be, and they are diſſeiſed, and a diſcent is caſt, and they have iſſue and die, if the iſſue of the one recover her moietie, the other ſhall not enter with her, becauſe their remedies were ſeverall: and yet when both have recovered, they are coparceners againe. So here in this caſe that *Littleton* putteth, the two joyntenants have not equall remedie; for the infant hath a right of entry, and the other a right of action; and therefore the infant being remitted to a moitie, the other ſhall not enter and take the profits with her. (2 Inſt. 308.) [364. b.] 10 H. 6. 10. 19 H. 6. 45. 31 H. 6. tit. Ent. Cong. 54.

If *A.* and *B.* joyntenants in fee, be diſſeiſed by the father of *A.* who dieth ſeiſed, his ſonne and heire entreth, he is remitted to the whole, and his companion ſhall take advantage thereof. Otherwiſe here in the caſe of *Littleton*, for that the advantage is given to the infant, more in reſpect of his perſon than of his right; whereof his companion ſhall take no advantage. But if the grandfather had diſſeiſed the joyntenants, and the land had deſcended to the father, and from him to *A.* and then *A.* had died, the entrie of the other ſhould be taken away by the firſt diſcent; and therefore he ſhould not enter with the heire of *A.*

But here in the caſe of *Littleton*, if after the diſcent the other joyntenant had died, and the infant ſurvived, ſome ſay that he ſhould have entred into the whole, becauſe hee is now, in judgement of law, ſolely in by the firſt feoffment, and he claimeth not under the diſcent. Vide 35 Aſſ. pl. ultim.

* *&c.* not in L. and M. nor Roh. † *deux* not in L. and M. nor Roh.

Chap. 13. Of Warrantie. Sect. 697.

IL eſt communement dit, que trois garranties y ſont, ſcilicet, garrantie lineal, garrantie collateral, et garrantie que commence per diſſeiſin. Et eſt aſcavoir, que devant l'eſtatute de Glouceſter touts garranties queux diſcendont a eux queux ſont heires a eux queux feſoyent les garranties, fueront barres a meſmes les heires a demander aſcuns terres ou tenements encounter les garranties, forepriſe les garranties queux commencerent per diſſeiſin; car tiel garrantie ne fuit unque barre al heire, pur ceo que le garrantie commence per tort, ſcilicet, per diſſeiſin.

IT is commonly ſaid, that there bee three warranties, *ſcilicet*, warrantie lineall, warrantie collaterall, and warrantie that commence by diſſeiſin. And it is to be underſtood, that before the ſtatute of *Glouceſter* all warranties which deſcended to them which are heires to thoſe who made the warranties, were barres to the ſame heires to demand any lands or tenements againſt the warranties, except the warranties which commence by diſſeiſin; for ſuch warrantie was no barre to the heire, for that the warrantie commenced by wrong, viz. by diſſeiſin.

Vide Sect. 288. 331. (Vaughan 375.) (1 Rep. 1.)

"*IL eſt communement dit.*" Here by the opinion of *Littleton communis opinio* is of authoritie, and ſtands with the rule of law, *A communi obſervantia non eſt recedendum:* and againe, *Minimè mutanda ſunt quæ certam habuerunt interpretationem.* [365. a.]

Here our author beginneth this Chapter with an exact diviſion of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heires are bound to warrant the ſame; and either upon voucher, or by judgement in a writ of *warrantia cartæ*, to yeeld other lands and tenements (which in old bookes is called *in excambio*) to the value of thoſe that ſhall bee evicted by a former title, or elſe may bee uſed by way of *rebutter*. (1)

Bract. lib. 2. fol. 37. Lib. 5. fol. 380, 381, &c. Glanvill. lib. 3. cap. 1, 2, 3. Lib. 7. cap. 2, 3. Lib. 9. ca. 4. Britton ca. 105. fol. 249, 250, &c. & fol. 88. 106. b. 196, 197. Fleta lib. 5. cap. 15. Lib. 6. cap. 23. Mirr. cap. 2. § 17. 38 E. 3. 21. 45 E. 3. 18.

(Ant. 303. b. 2 Roll. Abr. 775, 776. Cro. Jac. 4.) [c] Britton fol. 197. b.

"*Rebouter*," is a French word, and is in Latine *repellere*, to repell or barre; that is, in the underſtanding of the common law, the action of the heire by the warrantie of his anceſtor; and this is called to rebut or repell. [c] *Britton* ſaith, *Garranter en un ſence ſignifie a defender ſon tenant en ſa ſeiſin, et en auter ſence ſignifie que ſi il ne defende que le garrant luy, ſoit tenue a eſchangée, et de faire ſon gree a la vaillaunce.* [d] *Bracton* ſaith, *Warrantizare nihil aliud eſt, quàm defendere et acquietare tenentem qui warrantum vocavit in ſeiſind ſud.* [e] *Fleta* ſaith, *Warrantizare nihil aliud eſt quàm poſſidentem vocantem defendere et acquietare in ſud ſeiſind vel poſſeſſione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.*

[d] Bract. lib. 5. fol. 380.

[e] Fleta lib. 5. cap. 15.

Lib. 4. fol. 81. Noke's caſe. (F. N. B. 134. K.)

It is to be obſerved, that there be two kinde of warranties, that is to ſay, *warrantia expreſſa et tacita*, vulgarly ſaid warrantie in deed, becauſe they be expreſſed; and warranties in law, becauſe the law doth tacitely imply them. And this diviſion of warranties that

(1) [See Note 315.]

that *Littleton* here ſpeaketh of, he intendeth of warranties in deed. And of warranties in law, more ſhall be ſaid hereafter in this Chapter. As for promiſes or contracts annexed to chattels reall or perſonall, they are not intended by our author in his ſaid diviſion, but only warranties concerning freeholds and inheritances. Vid. Sect. 733. (2 Roll. Abr. 738. Sid. 178. Cro. Ja. 4. Ant 101. b. Poſt. 384. a.

"*Devant le ſtatute de Glouceſter.*" This ſtatute was made at a parliament holden at *Gloceſter* in the ſixth yeare of the reigne of king *E.* 1. and therefore it is called the ſtatute of *Gloceſter*. 1 Roll. Rep. 316. Cro. Jac. 386. 3 Bulſt. 95. Poph. 143. Bridg. 128.

"*Sont barres a meſmes les heires a demander aſcuns terres, &c.*" For the ſtatute, as hath beene ſaid, being made in *6 E.* 1. (was before the ſtatute of *donis conditionalibus*, which was enacted 13 *Edward* 1.) when all ſtates of inheritance were fee ſimple. But after the ſtatute of 13 *Edward* 1. the heire in tayle is not barred by the warrantie of his anceſtour, unleſſe there be aſſets, as ſhall be ſaid hereafter more largely in this Chapter. Owen 60. 3 Mod. 261. S.C. Shower 68.) Gloc. cap. 3. Vid. Sect. 724, 725 & 727, &c. (2 Inſt. 293.) Bracton lib. 4. fol. 321. b.

Fleta lib. 5. cap. 34. 7 E. 3. Garr. 47.

By the ſtatute of *Gloceſter* foure things are enacted. (3 Rep. 52, 53.)

Firſt, that if a tenant by the courteſie alien with warrantie and dieth, that this ſhall bee no barre to the heire in a writ of *mordanceſter*, without aſſets in fee ſimple; and if lands or tenements deſcend to the heire from the father, he ſhall be barred, having regard to the value thereof.

[365. b.] Secondly, that if the heire, for want of aſſets at that time deſcended, doth recover the lands of his mother by force of this act, and afterwards aſſets deſcend to the heire from the father, then the tenant ſhall recover againſt the heire the inheritance of the mother by a writ of falſe judgement, which ſhall iſſue out of the record, to reſummon him that ought to warrant, as it hath beene done in other caſes, where the heire being vouched commeth into the court, and pleadeth that he hath nothing by diſcent.

Thirdly, that the iſſue of the ſoane ſhall recover by a writ of *coſinage*, *aiel*, and *beſaiel*.

And laſtly, that the heire of the wife, after the death of the father and mother, ſhall not bee barred of his action to demand the heritage of the mother by writ of entrie, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Concerning the firſt, there be two points in law to be obſerved. (Ant. 54. b.)

Firſt, albeit the ſtatute in this article name a writ of *mordanceſter*, and after writs of *coſinage*, *aiel*, and *beſaiel* [*e*]; yet a writ of right, *formedon*, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this ſtatute; for thoſe actions are put but for examples. [*e*] 11 E. 2. tit. Garr. 83. 4 E. 3. Garr. 63. 18 E. 3. 51. Pl. Com. 110.

7 E. 3. 53. Temps E. 1. Garr. 87.

Secondly, where it is ſaid in the ſaid act (if the tenant by the courteſie alien), yet this releaſe with warrantie to a diſſeiſor, &c. is within the purview of the ſtatute, for that it is in equall miſchiefe; and if that evaſion might take place, the ſtatute ſhould have beene made in vaine. 27 E. 3. 8, 9. 14 E. 4. Gar. 5. Dier quarto Mar. 148. a.

If tenant by the courteſie be of a ſeigniorie, and the tenancie eſcheate unto him, and after he alieneth with warrantie, this ſhall

22 Aſſ. 9 & 37. Temps E. 1. Gar. 86.

not binde the iſſue, unleſſe aſſets deſcend; for it is in equall miſchiefe. But notwithſtanding this ſtatute, if feme tenant in dower had alienedin fee with warranty and died, the warranty had bound

[o] 11 H. 7. cap. 20. (Poſt. 380. a. 381. a.)

the heire untill the ſtatute [o] of 11 *H.* 7. ſince our author wrote: by which ſtatute the heire may enter, notwithſtanding ſuch warrantie.

But note, there is a diverſitie betweene a warranty on the part of the mother, and an eſtoppell; for an eſtoppell of the part of the mother ſhall not binde the heire, when hee claimeth from the

18 E. 3. 9.

father: as if lands bee given to the huſband and wife, and to the heires of the huſband, the huſband make a gift in taile, and dieth,

(Hob. 31. 8 Rep. 54. a.)

the wife recovereth in a *cui in vitâ* againſt the donee, ſuppoſing that ſhe had fee ſimple, and make a feoffement and dyeth, the donee dyeth without iſſue, the iſſue of the huſband and wife bring a *formedon* in the reverter againſt the feoffee; and notwithſtanding that his was heire to the eſtoppell, and the mother was eſtopped, yet for that he claimed the land as heire to his father, hee was not eſtopped. Note, that warranties are favoured in law, being part of a man's aſſurance; but eſtoppels are odious.

21 R. 2. Judgement 263. (2 Roll. Abr. 776. 8 Rep. 53. b. Ant. 326. a. Doct. & Stud. 44. b. 1 Leo. 261.)

If a feme heire of a diſſeiſor infeoffeth me with warrantie, and marrieth with the diſſeiſee, if after the diſſeiſee bring a *præcipe* againſt me, I ſhall rebut him, in reſpect of the warrantie of his wife, and yet he demandeth the land in another's right. And ſo if the huſband and wife demand the right of the wife, a warrantie of the collaterall anceſtor of the huſband ſhall barre.

If a woman had beene tenant for life, the remainder or reverſion to her next heire, and the woman had alienedin fee and died, this warrantie had barred her heire in remainder or reverſion; but this

11 H. 7. cap. 20. Vid. Sect. 595. See this ſtatute of 11 H. 7. c. 20. wellexpounded, Lib. 1. fol. 176. in ſir Anthony Mildmaye's caſe.

is partly holpen by the ſaid act of 11 *H.* 7. viz. where the woman hath any eſtate for life of the inheritance or purchaſe of her huſband, or given to her by any of the anceſtors of the huſband, or by any other perſon ſeiſed to the uſe of her huſband, or of any of his anceſtors, there her alienation, releaſe, or confirmation with warrantie, ſhall not binde the heire.

3 & 4 Ph. & Mar. Dier 146. Lib. 3. fol. 59, 60, 61, 62. Lincolne Coll. caſe. Pl. Com. fol. 56. 20 Eliz. Dier 362. Doct. & Student 35. 8 Eliz. Dier. 248. 19 Eliz. Dier 354. 21 Eliz. ibid. 362. Lib. 3. fol. 50, 51. ſir George Browne's caſe. Lib. 5. fol. 79. Fitzh. caſe. 27 H. 8. 23.

To the authorities quoted in the margent, which may ſerve as commentaries upon the ſaid ſtatute, I will only adde two caſes.

[f] Mich. 13. Jac. inter Harley & Weſt in ejectione firmæ in Communi Banco. Lincoln.

The one was [f] A man ſeiſed of lands in fee levied a fine to the uſe of himſelfe for life, and after to the uſe of his wife, and of the heires males of her body by him begotten for her jointure, and had iſſue male, and after he and his wife levied a fine, and ſuffered a common recovery, the huſband and wife died, and the iſſue male entred by force of the ſaid ſtatute of 11 *H.* 7. And it was holden by the juſtices of aſſiſe (the caſe comming downe to be tried by *niſi prius*), that the entry of the iſſue male was lawfull: and yet this caſe is out of the letter of the ſtatute; for ſhe neither levied the fine, &c. being ſole, or with any other after-taken huſband, but is by herſelfe with her huſband that made the joynture. *Sed qui hæret in literâ hæret in cortice;* and this caſe being in the ſame miſchiefe, is therefore within the remedy of the ſtatute, by the intendment of the makers of the ſame, to avoid the diſherſion of heires who were provided for by the ſaid joynture, and eſpecially by the

the husband himselfe that made the joynture, which (as it was said) is a stronger case than the example set downe in the statute. The
[366. a.] other was, [g] A man is seised of lands in the right of his wife, and they two levie a fine, and the conusee grant and rendereth the land to the husband and wife in speciall tayle, the remainder to the right heires of the wife, they have issue, the husband dyeth, the wife taketh another husband, and they two levie a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warrantie shall binde the heire at this day. So if a man bee tenant for life (otherwise than as tenant by the courtesie) and alien in fee with warrantie, and dieth, this shall at this day binde the heire that hath the reversion or remainder by the common law not holpen by any statute. But all this is to be understood, unlesse the heire that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestour; for then the estate being avoided, the warrantie being annexed unto the estate, is avoided also; whereof more shall be said in this Chapter in his proper place. And therefore it is necessary for the heire in such cases to make an entry as soone as he hath notice or probable suspicion of such an alienation.

(1 Rep. 66. Post. 367. b. 388. b.

[g] Pasch. 17 Eliz. (4 Rep. 10. Ant. 360. a. 115. a. Post. 369. a. 381. a. Sid. 24. Plo. 105. a. Dyer 64. b. Jo. 31. Hob. 332. Cro. Eliz. 2. 2 Cro. 475. Ben. 40. 2 Inst. 681. W. Jones 13 & 254. Palm. 24. 32. 216. Cro. Car. 244. pl. 464. Com. Banco. Latton's case, which I myselfe heard and observed. (2 Roll. Abr. 141. Moor. 93.) Sect. 725. 10 Rep. 95.)

As to the second clause of the statute of *Gloucester*, there are two points of law to be observed.

First, that by the expresse purview of the statute, if assets doe after discend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a *formedon*, if at the time of the warrantie pleaded no assets be discended, whereby the demandant recovereth, if after assets discend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in taile aliened the assets, his issue should recover in a *formedon*; and therefore the sages of the law, to prevent future occasions of suits, resolved the said diversitie in the cases aboveseid, upon consideration and construction of the statute of *Gloucester*, and of the statute *de donis conditionalibus*.

Pl. Com. Fulmerstone's case, 110. a. Lib. 8. fol. 53. Sym's case.

Secondly, it is to bee observed, that after assets discended, the recoverie shall bee by writ of judgement, which shall issue out of the rolle of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is cleere, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgement the *scire facias* is to be grounded: for explanation whereof it is to be understood, that if the tenant will have benefit of the statute he must plead the warrantie, and acknowledge the title of the demandant, and pray that the advantage of the statute may bee saved unto him, and then if after assets discend, the tenant upon this record shall have a *scire facias*: and if afcets discend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warrantie, and plead further that assets discended, &c. and the demandant taketh issue that assets discended not, &c. which issue is found for the demandant, where-

Lib. 8. fol. 53, 54. Sym's case. Ibid. 134. Mary Shipley's case. (Doct. Pla. 180. 2 Cro. 15. Ant. 33. a. 326. a.)

upon he recovereth, the tenant, albeit aſſets doe after diſcend, ſhall never have a *ſcire facias* upon the ſaid judgement; for that by his falſe plea he hath loſt the benefit of the ſaid ſtatute.

Touching the third, ſufficient hath beene ſpoken before. For the laſt, it is to be obſerved, that if the huſband be ſeiſed of lands in the right of his wife, and maketh a feoffement in fee with warrantie, the wife dieth, and the huſband dieth, this warrantie ſhall not binde the heire of the wife without aſſets, albeit the huſband be not tenant by the curteſie. But of this you ſhall reade more hereafter.

8 E. 2. tit. Gar. 81. 18 E. 3. 51.

Vide Sect. 725.

In the meane time know this, that the learning of warranties is one of the moſt curious and cunning learnings of the law, and of great uſe and conſequence. (1)

(2 Roll. Abr. 774. Hob. 14. 28. 2 Saund. 183.)

"*A demander aſcuns terres ou tenements.*" A warrantie may not only be annexed to freeholds, or inheritances corporeall, which paſſe by livery, as houſes and lands, but alſo to freeholds or inheritances incorporeall, which lye in grant, as advowſons; and to rents, commons, eſtovers, and the like, which iſſue out of lands or tenements. And not onely to inheritances *in eſſe*, but alſo to rents, commons, eſtovers, &c. newly created. As a man (ſome ſay) may grant a rent, &c. out of land for life, in tayle, or in fee with warrantie; for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it iſſueth before the grant of the rent, which rent may bee avoided by the recovery of the land; in which caſe the grantee may helpe himſelfe by a *warrantia cartæ*, upon the eſpeciall matter. And ſo a warrantie in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implyeth a warrantie in law. And ſo a rent newly created may be granted for oweltie of partition.

2 H. 4. 13. 30 H. 8r Dier 41. Temps E. 1. Admeſurement 16. 32 E. 1. Voucher 294. 30 E. 1. Exchange 16. 9 E. 4. 15 E. 4. 9. 29 Aſſ. 13. (F. N. B. 134. Ante 50. b. 101. b. 308. nota. Poſt. 389. a.)

Vide Sect. 741. 45 E. 3. Voucher 72. 9 E. 3. 78. 18 E. 3. 55. 30 E. 3. 30. 21 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 10 E. 4. 9. b. 21 E. 4. 26.

A man ſeiſed of a rent ſecke iſſuing out of the mannor of *Dale*, taketh a wife, the huſband releaſeth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant ſhall vouche, for that albeit the releaſe enured by way of extinguiſhment, yet the warrantie extended to it; and by warranting of the land, all rents, &c. iſſuing out of the land, that are ſuſpended or diſcharged at the time of the warrantie created, are warranted alſo. [366. b.]

14 H. 8. 30 H. 8. Dier 42. (2 Roll. Abr. 744.)

Sect. 698.

GARRANTY que commence per diſſeiſin eſt en tiel forme: ſicome lou il eſt pier et fits, et le fits purchaſe terre, &c. et leſſa meſme la terre

WARRANTIE that commences by diſſeiſin is in this manner: as where there is father and ſon, and the ſonne purchaſeth land, &c.

(1) Upon the alterations made by the ſtatute law in the doctrine of warranty, ſee note 1. 373. b.

terre a ſon pier pur terme d'ans, et pier per ſon fait ent enfeoffa un auter en fee, et oblige luy et ſes heires a garranty, et le pier devy, per que le garranty diſcendiſt al fits, ceo garranty ne barrera my le fits; car nient obſtant cel garrantie le fits poit bien enter en la terre, ou aver un aſſiſe envers l'alienee s'il voit, pur ceo que le garrantie commence per diſſeiſin; car quant le pier que n'avoit eſtate forſque pur terme des ans, fiſt un feoffement en fee, ceo fuit un diſſeiſin al fits del franktenement que adonques fuiſt en le fits. En meſme le maner eſt, ſi le fits leſſa a le pier la terre a tener a volunt, et puis le pier fait un feoffment ove garrantie, &c. Et ſicome eſt dit de pier, iſſint poit eſtre dit de cheſcun auter auncеſter, &c. En meſme le maner eſt, ſi tenaunt per elegit, *tenaunt per ſtatute merchant, ou tenant per ſtatute de le ſtaple, fait feoffment en fee ovesque garrantie, † ceo ne barrera my l'heire que doit aver la terre, pur ceo que tiels garranties commencerent per diſſeiſin.*

&c. and letteth the ſame land to his father for terme of yeares, and the father by his deed thereof infeoffeth another in fee, and bindes him and his heires to warrantie, and the father dies, whereby the warrantie deſcendeth to the ſon, this warrantie ſhall not barre the ſonne; for notwithſtanding this warrantie the ſonne may well enter into the land, or have an aſſiſe againſt the alienee if he will, becauſe the warrantie commenced by diſſeiſin; for when the father which had but an eſtate for terme of yeares, made a feoffement in fee, this was a diſſeiſin to the ſonne of the freehold which then was in the ſonne. In the ſame manner it is, if the ſonne letteth to the father the land to hold at will, and after the father make a feoffment with warrantie, &c. And as it is ſaid of the father, ſo it may be ſaid of every other anceſter, &c. In the ſame manner is it, if tenant by *elegit*, tenant by ſtatute merchant, or tenant by ſtatute ſtaple, make a feoffment in fee with warranty, this ſhal not bar the heire which ought to have the land, becauſe ſuch warranties commence by diſſeiſin.

"*GARRANTY que commence per diſſeiſin, &c.*" (1) It is called a warranty that commenceth by diſſeiſin, becauſe regularly the conveyance whereunto the warranty is annexed doth worke a diſſeiſin. (Doct. & Stud. 155. a. b.)

In this Section *Littleton* putteth five examples of a warrantie commencing by diſſeiſin, viz. of a feoffement made with warranty by tenant for yeares, by tenant at will, by tenant by *elegit*, by tenant by ſtatute merchant, and by tenant by ſtatute ſtaple: all theſe and the other examples that *Littleton* putteth of this kinde of warranties in the ſucceeding Sections, have foure qualities. 7 E. 3. 41. 43 E. 3. 17. 50 E. 3. 12. Vide Sect. 611. (2 Inſt. 154. 1 Roll. Abr. 663. 3 Rep. 37.)

Firſt, that the diſſeiſin is done immediately to the heire that is to be bound; and yet if the father bee tenant for life, the remainder to the ſonne in fee, the father by covine and conſent maketh a leaſe for yeares, to the end that the leſſee ſhall make a feoffement in fee, to whom the father ſhal releaſe with warrantie, and all is executed accordingly, the father dyeth, this warrantie ſhall not binde, albeit the diſſeiſin was not done immediately to the ſonne; for the feoffement of the leſſee is a diſſeiſin to the father, who is *particeps criminis*. Lib. 5. fol. 79. b. Fitzherbert's caſe. (Cro. Car. 485. 2 Roll. Abr. 741.)

† *&c.* added L. and M. and Roh.

(1) [See Note 316.]

criminis. So it is if one brother make a gift in tayle to another, and the uncle diſſeiſe the donee, and infeoffeth another with warrantie, the uncle dieth, and the warrantie deſcendeth upon the donor, and then the donee dyeth without iſſue, albeit the diſſeiſin was done to the donee and not to the donor, yet the warrantie ſhall not binde him. The father, the ſonne, and a third perſon are joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the ſonne dieth, the third perſon ſhall not only avoyd the feoffment for his owne part, but alſo for the part of the ſonne; and he ſhall take advantage that the warrantie commenced by diſſeiſin, though the diſſeiſin was done to another. [367. a.]

31 E. 3. tit. Garrantie 28. (5 Rep. 50. a.)

(2 Roll. Abr. 772, 773. Ant. 32. a. 56. a. 171. a. 179. a. F.N.B. 149. c.)

(Cro. Car. 483.)

The ſecond qualitie appearing in *Littleton*'s examples is, that the warrantie and diſſeiſin are *ſimul et ſemel*, both at one and the ſame time. [y] And yet if a man commit a diſſeiſin of intent to make a feoffment in fee with warrantie, albeit he make the feoffment many yeares after the diſſeiſin, notwithſtanding becauſe the warrantie was done to that intent and purpoſe, the law ſhall adjudge upon the whole matter, and by the intent couple the diſſeiſin and the warrantie together.

[y] 19 H. 8. 12. Lib. 5. fol. 79. b. Fitzh. caſe. (Plowd. 51. a. 3 Rep. 78. Poſt. 369. a. 371. a. 9 Rep. 81. a. Ant. 314. b. 5 Rep. 78.)

The third qualitie is, that the warrantie that commenceth by diſſeiſin by all theſe examples (if it ſhould binde) ſhould binde as a collaterall warrantie, and therefore commencing by diſſeiſin ſhall not binde at all.

(1 Leon. 304, 305. Cro. Car. 388.) Vide Sect. 611. 699. Bract. fol. 216. 223, 224. Fleta lib. 4. cap. 17. 1, 2 Britton, cap. Diſſeiſin. 50 E. 3. 12. b, 8 H. 7. 5. 7 E. 3. 11. 14 E. 3. Feoffments et faits 67. 18 E. 3. Iſſue 36. 4 E. 2. Briefe 790. 19 E. 2. Aſſ. 400. 43 E. 3. 7. 17 E. 3. 41. 43 E. 3. Diſſ. 5. 8 E. 4. 17. 12 E. 4. 18. 10 E. 4. 18. F. N. B. 201. Lib. 3. fol. 78. in Fermor's caſe.

"*Ne barrera my le heire, &c.*" For by the authoritie of our author himſelfe, a leſſee for yeares may make a feoffment, and by his feoffment a fee ſimple ſhall paſſe; ſo as albeit as to the leſſor it worketh by diſſeiſin, yet betweene the parties the warrantie annexed to ſuch eſtate ſtandeth good; upon which the feoffee may vouch the feoffor or his heires, as by force of a lineall warrantie. And therefore if a leſſee for yeares, or tenant by *elegit*, *&c.* or a diſſeiſor incontinent make a feoffment in fee with warrantie, if the feoffee be impleaded, hee ſhall vouch the feoffor, and after him his heire alſo; becauſe this is a covenant reall, which binde him and his heires to recompence in value, if they have aſſets by diſcent to recompence; for there is a feoffment *de facto*, and a feoffment *de jure*: [*] and a feoffment *de facto* made by them that have ſuch intereſt or poſſeſſion as is aforeſaid, is good betweene the parties, and againſt all men but only againſt him that hath right. And therefore if the lord be gardeine of the land, or if the tenant maketh a leaſe to the lord for yeares, or if the lord be tenant by ſtatute merchant, or ſtaple or by *elegit* of the tenancie, and make a feoffment in fee, hee hereby doth extinguiſh his ſeigniorie, although having regard to the leſſor it is a diſſeiſin.

[*] Temps E. 1. Counterplea de Voucher 126. 50 E. 3. ibidem 124. Vide W. 1. cap. 39. in the ſecond

The fourth qualitie is a diſſeiſin; but that is put for an example; and the rather, for that it is moſt uſuall and frequent: but a warrantie that commenceth by abatement or intruſion (that is, when the abatement or intruſion is made of intent to make a feoffment in fee with warrantie), ſhall not binde the right heire, no more than a warranty that commenceth by diſſeiſin, becauſe all doe commence by wrong. And ſo it is if the tenant dieth without heire, and an anceſtor of the lord enter before the entrie of the lord, and make a feoffment in fee with warrantie, and dieth, this warrantie

ſhall

ſhall not binde the lord, becauſe it commenceth by wrong, being in nature of an abatement. *Et ſic de ſimilibus.* (1)

part of the Inſtitutes. (10 Rep. 95. 2 Roll. Abr. 740.)

Sect. 699.

ITEM, ſi gardein en chivalrie, ou gardein en ſocage, fait un feoffment en fee, ou en fee taile, [367. b.] *ou pur terme de vie, oveſque garrantie, &c. tiels garranties ne ſont pas barres a les heires as queux les terres ſerront diſcendus, pur ceo que ils commence per diſſeiſin.*

ALSO, if a gardeine in chivalrie, or gardeine in ſocage, make a feoffment in fee, or in fee taile, or for life, with warrantie, &c. ſuch warranties are not barres to the heyres to whom the lands ſhall bee diſcended, becauſe they commence by diſſeiſin.

HERE *Littleton* addeth the caſe of gardeine in chivalrie, and gardeine in ſocage, and gardeine becauſe nurture is alſo in the ſame caſe. 16 E. 3. Gar. 80. 8 Aſſ. 2. 43 E. 3. 7. and the books aboveſaid. Vide Sect. 698. (3 Rep. 37.)

Sect. 700.

*ITEM, ſi le pier et le fits purchaſe certaine terres ou tenements, a aver et tener a eux joyntment, &c. et puis le pier alien * l'entier a un auter, et oblige luy et ſes heires a garrantie, &c. et puis le pier devie, cel garrantie ne barrera my le fits de le moitie que a luy affiert de les dits terres ou tenements, pur ceo que quant a cel moitie que affiert a le fits, le garrantie commence per diſſeiſin, &c.*

ALSO, if father and ſonne purchaſe certaine lands or tenements, to have and to hold to them joyntly, &c. and after the father alien the whole to another, and binde him and his heires to warrantie, &c. and after the father dieth, this warrantie ſhall not barre the ſonne of the moitie that belongs to him of the ſaid lands or tenements, becauſe as to that moitie which belongs to the ſonne, the warrantie commences by diſſeiſin, &c.

"*A AVER et tener a eux jointment, &c.*" This is to bee intended of a joynt purchaſe in fee; for if the purchaſe were to the father and the ſonne, and the heires of the ſonne, and the father maketh a feoffment in fee with warrantie, if the ſonne entreth in the life of the father, and the feoffee re-enter, the father dieth, the ſonne ſhall have an aſſiſe of the whole: and ſo is the booke of 22 *H.* 6. to be underſtood. But if the ſonne had not entred in the life of the father, then for the father's moitie it had beene a barre to the ſonne, for that therein he had an eſtate for life; and therefore the warrantie as to that moitie had beene collaterall to the ſonne, and by diſſeiſin for the ſonne's moitie; and ſo a warrantie defeated in part, and ſtand good in part. And this appeareth by 13 Aſſ. 8. 13 E. 3. Gar. 24, 25. 37. 22 H. 6. 51. 8 H. 7. 6. (5 Rep. 79.) (Poſt. 393. a.) (1 Rep. 66.)

* *l'entier—l'entierte*, L. and M. and Roh.

(1) [See Note 317.]

by the example that *Littleton* hath put. But if the purchaſe had beene to the father and ſonne, and to the heires of the father, then the entrie of the ſonne in the life of the father, as to the avoydance (F.N.B. 192. a.) of the warrantie, had not availed him, becauſe his father lawfully conveyed away his moitie. (1)

Temps E. 1. Vouch. 207. 39 E. 3. 26. John London's caſe, 14 H. 6. (8 Rep. 42. Plowd. 66. b. 6 Rep. 119.)

If a man of full age and an infant make a feoffment in fee with warrantie, this warrantie is not void in part, and good in part; but it is good for the whole againſt the man of full age, and voyd againſt the infant; for albeit the feoffment of an infant paſſing by liverie of ſeiſin be voydable, yet his warrantie, which taketh effect only by deed, is meerely voyd.

Sect. 701. [365. a.]

*ITEM, ſi A. de B. ſoit ſeiſie d'un meſe, et F. de G. que nul droit ad d'entrer en meſme le meaſe, claimaunt meſme le meaſe, a tener a luy et a ſes heires, entra en meſme le meaſe, mes le dit A. de B. adonque eſt continualment demurrant en meſme le meaſe: en ceſt cas le poſſeſſion de franktenement ſerra tout temps adjudge en A. de B. et nemy en F. de G. pur ceo que en tiel caſe lou deux ſont en un meaſe, ou auters tenements, et l'un claima per l'un title, et l'auter per l'auter title, la ley adjudgera celuy en poſſeſſion que ad droit d'aver le poſſeſſion de meſmes les tenements. Mes ſi en le caſe avantdit, le dit F. de G. fait un feoffment a certaine barrettors et extortioners en le pais, pur maintenance de eux aver de meſme le meaſe, per un fait de feoffment ove garrantie, per force de quel le dit A. de B. ne oſaſt pas demurrer en le meaſe, mes * alaſt hors de le meaſe, ceſt garrantie commence per diſſeiſin, pur ceo que tiel feoffment fuit la cauſe que le dit A. de B. relinquiſt le poſſeſſion de meſme le meaſe †.*

ALSO, if *A.* of *B.* bee ſeiſed of a meſe, and *F.* of *G.* that no right hath to enter into the ſame meſe, claiming the ſaid meſe, to hold to him and to his heires, entreth into the ſayd meſe, but the ſame *A.* of *B.* is then continually abiding in the ſame meaſe: in this caſe the poſſeſſion of the freehold ſhall bee alwayes adjudged in *A.* of *B.* and not in *F.* of *G.* becauſe in ſuch caſe where two bee in one houſe, or other tenements, and the one claimeth by one title, and the other by another title, the law ſhal adjudge him in poſſeſſion that hath right to have the poſſeſſion of the ſame tenements. But if in the caſe aforeſayd, the ſayd *F.* of *G.* make a feoffment to certaine barrettors and extortioners in the countrie, to have maintenance from them of the ſayd houſe, by a deed of feoffment with warrantie, by force whereof the ſaid *A.* of *B.* dare not abide in the houſe, but goeth out of the ſame, this warrantie commenceth by diſſeiſin, becauſe ſuch feoffment was the cauſe that the ſayd *A.* of *B.* relinquiſhed the poſſeſſion of the ſame houſe.

(Ant. 194. a. 244. a. 1 Roll. Abr. 661, 662. Plowd. 233. b.) "*LOU deux ſont en un meſe, &c. et l'un claima per l'un title, et l'auter per auter title, &c.*" For the rule is, *Duo non poſſunt in ſolido unam rem poſſidere.*

19 H. 6. fol. 28. b. per Newton. (Siderf. 385. a. Ant. 180. b. 181. a.)

* *ſe in* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 318.]

Theſe

Theſe words of our author be ſignificant and materiall: [k] for if a man hath iſſue two daughters, baſtard eigne and mulier puiſne, and die ſeiſed, and they both enter generally, the ſole poſſeſſion ſhall not bee adjudged only in the mulier, becauſe they both claime by one and the ſame title; and not one by one title, and the other by another title, as our author here ſaith.

[k] 17 E. 3. 59. 11 Aſſ. p. 23. (Perk. 84. 8 Rep. 101. b. Hob. 120. Ant. 189. 244. 10 Rep. Lampet's caſe.)

[i] If the tenaunt in an aſſiſe of an houſe deſire the plaintiffe to dine with him in the houſe, which the plaintiffe doth accordingly, and ſo they bee both in the houſe; and in truth one pretendeth one title, and the other another title; yet the law in this caſe ſhall not adjudge the poſſeſſion in him that right hath; becauſe our author here ſaith, hee claimed not his right, and it ſhould be to his prejudice if the law ſhould adjudge him poſſeſſion; and a treſpaſſer hee cannot bee, becauſe hee was invited by the tenant in the aſſiſe.

[i] Pl. Com. 94. the Parſon of Honey Lane's caſe. (Ant. 245. b. Plowd. 93. a. b.)

"*Barrettors.*" A barrettor is a common moover and exciter, or maintainer of ſuits, quarrels, or parts, either in courts or elſewhere in the countrey. In courts, as in courts of record, or not of record; as in the countie, hundred, or other inferior courts. In the countrie in three manners: firſt, in diſturbance of the peace: ſecondly, in taking or keeping of poſſeſſions of lands in controverſie, not only by force, but alſo by ſubtiltie and a deceit, and [368. b.] moſt commonly in ſuppreſſion of truth and right: thirdly, by falſe inventions, and ſowing of calumniations, rumors, and reports, whereby diſcord and diſquiet may grow betweene neighbours.

See the Inditement of a common Barretor. W. 1. cap. 18 & 32. 40 E. 3. 33. Lib. 8. fol. 36. b. Caſe de Barretrie. (3 Inſt. 175. Sideꝛf. 282. 2 Roll. Abr. 355.) (1 Roll. Abr. 353.)

"*Barretor*" is derived of this word (*barret*) which ſignifieth not only a wrangling ſuit, but alſo ſuch brawles and quarrels in the countrey as are aforeſaid.

33 E. 1. Stat. de Conſpiracie. Lib. 8. ubi ſupra. (3 Rep. 36.)

"*Extortioners.*" Extortion, in his proper ſenſe, is a great miſpriſion, by wreſting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due; *quod non eſt debitum, vel quod eſt ultra debitum, vel ante tempus quod eſt debitum:* for this is to be knowne, that it is provided by the [l] ſtatute of *W.* 1. that no ſheriffe, nor any other miniſter of the king, ſhall take any reward for doing of his office, but only that which the king alloweth him, upon paine that hee ſhall render double to the partie, and be puniſhed at the king's pleaſure. And this was the antient common law, and was puniſhable by fine and impriſonment; but the ſtatute added the aforeſaid penaltie. But ſome latter ſtatutes having permitted them to take in ſome caſes; by colour thereof the king's officers and miniſters, as ſheriffes, coroners, eſcheators, feodaries, gaolers, and the like, doe offend in moſt caſes; and ſeeing this act yet ſtandeth in force, they cannot take any thing but where and ſo farre as latter ſtatutes have allowed unto them. But yet ſuch reaſonable fees as have beene allowed by the courts of juſtice of antient time to inferiour miniſters and attendants of courts for their labour and attendance, if it be aſked and taken of the ſubject, is no extortion.

P. Com. fol. 64. Lib. 10. fol. 101. 102. Beaufage's caſe. (3 Inſt. 149.)

[l] W. 1. c. 26. &c. W. 1. c. 10. 42 E. 3. 5. 27 Aſſ. 14. Pl. Com. 66. (2 Roll. Abr. 32.)

(Plowd. 465. Noy. 111. 2 Roll. Abr. 32.) 23 H. 6. c. 10. 33 H. 6. 22. 21 H. 7. 17. Stanf. 49. 3 E. 3. Cor. 372.

And all this was reſolved [n] by the whole court of king's bench, betweene *Shurley* plaintiffe, and *Packer* deputie of one of the ſheriffes of London, in an action upon the caſe in the king's bench.

[n] Hil. 13. Jac. Reg.

See

See the ſtatute of 21 *II.* 8. *cap.* 5. ſetting downe the fees of ordinaries, regiſters, and other officers, in certaine caſes, and many other ſtatutes; as for example, the ſtatute of 19 *H.* 7. *cap.* 8. againſt taking of ſhewage (that is, taking of any thing for ſhewing of wares and merchandiſes that be truly cuſtomed to the king before) and the like.

Pl. Com. in Dine and Manningham's caſe. Mir. cap. 5. § 1.

Of this crime it is ſaid, that it is no other than robberie; and another ſaith, that it is more odious than robberie; for robberie is apparant, and hath the face of a crime; but extortion puts on the viſure of vertue, for expedition of juſtice, and the like; and it is ever accompanied with the grievous ſinne of perjurie.

7 E. 4. 21.

But largely extortion is taken for any oppreſſion by extort power, or by colour or pretence of right; and ſo *Littleton* taketh it in this place. *Extortio* is derived from the verbe *extorqueo*; and it is called *crimen expilationis*, or *concuſſionis*: and here barretors and extortioners are put but for examples; for if the feoffment be made to any other perſon or perſons, the law is all one.

(3 Inſt. 175. 2 Inſt. 212. Dyer, 555, 556. Sid. 212, 213. Noy. 52.)

"*Pur maintenance de eux aver.*" Maintenance, *manutenentia*, is derived of the verbe *manutenere*, and ſignifieth in law a taking in hand, bearing up or upholding of quarrels and ſides, to the diſturbance or hindrance of common right; *Culpa eſt rei ſe immiſcere ad ſe non pertinenti*; and it is twofold, one in the countrey, and another in the court. For quarrels and ſides in the court [*k*] the ſtatutes have inflicted grievous puniſhments. But this kinde of maintenance of quarrels and ſides in the countrey is puniſhable only at the ſuit of the king, [*r*] as it hath beene reſolved. And this maintenance is called *manutenentia*, or *manutentio ruralis*, for example, as to take poſſeſſions, or keepe poſſeſſions, whereof *Littleton* here ſpeaketh, or the like. (1)

[*k*] 1 E. 3. cap. 14. 20 E. 3. cap. 4, 5.

[*r*] Mich. 7. Ja. in the Starre-Chamber. (Doc. Pla. 240.)

The other is called *curialis*, becauſe it is done *pendente placito*, in the courts of juſtice; and this was an offence at the common law, and is threefold,

First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or ſuit; and this is called *cambipartia*, champertie.

33 E. 1. Stat. 2. in fine. Regiſt. 183. 6 E. 3. 33. 22 H. 6. 7. 9 H. 7. 22. (2 Roll. Abr. 114.) 30 Aſſ. 5. 19 E. 4. 3.

The ſecond is, when one maintaineth the one ſide, without having any part of the thing in plea, or ſuit; and this maintenance is twofold, generall maintenance, and ſpeciall maintenance; whereof you ſhall reade at large in our bookes, which were too long here to be inſerted. [369. a.]

20 H. 6. 12. 34 H. 6. 2. 11 H. 6. 11. 8 H. 5. 8. 10 E. 4. 19. W. 1. cap. 25. 28 W. 2. cap. 49. Artic. ſuper Cart. cap. 11. F. N. B. 171, 172. Mirror cap. 1. § 5. (Mo. 6. Ant. 157, Hob. 294.)

[*u*] 13 H. 4. 16. b. F. N. B. 171. 11 H. 6. 10. 37 H. 6. 31.

The third is when [*u*] one laboureth the jury, if it be but to appeare, or if he inſtruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth againſt him; and if he take money, a *decies tantum* may be brought againſt him. And whether the jury paſſe for his ſide or no, or whether the jurie give any verdict at all, yet ſhall he be puniſhed as a maintainer or embraceor either at the ſuit of the king or partie.

Here

(1) [See Note 319.]

Here in this cafe that *Littleton* putteth, the feoffement is void by the ſtatute [a] of 1 *R.* 2.; for thereby it is enacted, that feoffements made for maintenance ſhall be holden for none, and of no value, ſo as *Littleton* putteth his cafe at the common law; for he ſeemeth to allow the feoffement, where he ſaith, *tiel feoffment fuit le cauſe, &c.*; but ſome have ſaid that the feoffement is not voide betweene the feoffor and feoffee, but to him that right hath.

[a] 1 R. 2. cap. 9. Vid. 27 H. 8. fol. 23.

Now, ſince *Littleton* wrote, there is a notable ſtatute [b] made in ſuppreſſion of the cauſes of unlawfull maintenance (which is the moſt dangerous enemie that juſtice hath), the effect of which ſtatute is,

[b] 32 H. 8. cap. 9. (Plowd. 79. a.)

Firſt, that no perſon ſhall bargaine, buy, or ſell, or obtaine any pretenced rights or titles.

(2 Roll. Abr. 113, 114. Hob. 115.)

Secondly, or take, promiſe, grant, or covenant to have any right or title of any perſon in or to any lands, tenements, or hereditaments; but if ſuch perſon which ſo ſhall bargaine, &c. their anceſtors, or they by whom he or they claime the ſame, have beene in poſſeſſion of the ſame, or of the reverſion or remainder thereof, or taken the rents or profits thereof by the ſpace of one whole yeare, &c. upon paine to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the ſame, to forfeit alſo the value.

(1 Leon. 167. 208. Plowd. 89. a.)

Thirdly, provided that it ſhall be lawfull for any perſon, being in lawfull poſſeſſion, by taking of the yearely farme, rents or profits, to obtaine and get the pretenced right or title, &c. of any lands whereof he or they ſhall be in lawfull poſſeſſion.

For the better underſtanding of which ſtatute, you muſt obſerve, that title or right may be pretenced two manner of wayes:

Firſt, when it is meerely in pretence or ſuppoſition, and nothing in verity.

(1 Cro. 232, 233.)

Secondly, when it is a good right or title in verity, and made pretenced by the act of the partie; and both theſe are within the ſaid ſtatute: for example, if *A.* be lawfull owner of land, and is in poſſeſſion, *B.* that hath no right thereunto granteth to, or contracteth for the land with another, the grantor and the grantee (albeit the grant be meerely void) are within the danger of the ſtatute; for *B.* hath no right at all, but only in pretence. If *A.* be diſſeiſed in this caſe, *A.* hath a good lawfull right; yet if *A.* being out of poſſeſſion, granteth to, or contracteth for the land with another, he hath now made his good right of entrie pretenced within the ſtatute, and both the grantor and grantee within the danger thereof. *A fortiori* of a right in action. *Quod nota.*

Pl. Com. fol. 80, &c. Partridge's caſe.

It is further to be knowne, that a right or title may be conſidered three manner of wayes.

Firſt, as it is naked and without poſſeſſion. Secondly, when the abſolute right commeth by releaſe or otherwiſe to a wrongfull poſſeſſion; and no third perſon hath either *jus proprietatis*, or *jus poſſeſſionis*. The third, when he hath a good right, and a wrongfull poſſeſſion. As to the firſt, ſomewhat hath beene ſaid, and more ſhall be ſaid hereafter. As to the ſecond, taking the former example, if *A.* be diſſeiſed, and the diſſeiſee releaſe unto him, he may preſently ſell, grant, or contract for the land, and need not tarrie a yeere; for it is a rule upon this ſtatute, that whoſoever hath the abſolute ownerſhip of any land, tenements, or hereditaments (as in this

Pl. Com. Partridge's caſe ubi ſup. 6 E. 6.

Brooke tit. Maintenance 38.

(Cro. Car. 388. Plowd. 89. a.)

this caſe the diſſeiſor hath), there ſuch owner may at his pleaſure bargaine, grant, or contract for the land, for no perſon can thereby be prejudiced or grieved. And ſo if a man mortgage his land, and after redeeme the ſame; or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargaine, grant, or contract for the land, for the reaſon aforeſaid. As to the third, if in the caſe aforeſaid the diſſeiſor dieth ſeiſed, and *A.* the diſſeiſee entreth, and diſſeiſe the heire of the diſſeiſor, albeit he hath an antient right, yet ſeeing the poſſeſſion is unlawfull, if he bargaine or contract for the land before hee hath beene in poſſeſſion by the ſpace of a yeare, he is within the danger of the ſtatute, becauſe the heire of the diſſeiſor hath right to the poſſeſſion, and he is thereby grieved, *et ſic de ſimilibus:* and albeit he that hath a pretenced right (and none in verity) getteth the poſſeſſion wrongfully, yet the ſtatute extendeth unto him aſwell as where he is out of poſſeſſion.

23 Eliz. Dier 374. Pl. Com. Partridge's caſe, f. 87.

Note, the words of the ſtatute be (any pretenced right), therefore a leaſe for yeares is within the ſtatute; for the ſtatute ſaith not (the right), but (any right), and the offendour ſhall forfeit the whole value of the land. And where the ſtatute ſpeaketh of rights in the plurall number, yet any one right is within the ſtatute. [*a*] But yet if a man make a leaſe for yeares to another to the intent to trie the title in an *ejectione firmæ*, that is out of the ſtatute, becauſe it is in a kinde of courſe of law; but if it be made to [369. b.] a great man, or any other to ſway or countenance the cauſe, that is within this ſtatute.

[*a*] Mich. 30 & 31 Eliz. 2811. inter Finch & Cockham in Com. Banc. (Mo. 266.) (2 Roll. Abr. 114.)

Alſo the ſtatute ſpeakes (of any right or title to any land, &c.) [*b*] A cuſtomary right, or a pretence thereof to lands holden by copie, is within this ſtatute.

[*b*] Lib. 4. fol. 26. Copihold caſes. 6 E. 6. tit. Maintenance Brooke 38.

The ſaid proviſo (which is rather added for explanation, than of any neceſſitie) extendeth only to a pretenced right or title, and to a good and cleare right; and therefore without queſtion, any that hath a juſt and lawfull eſtate may obtaine any pretenced right by releaſe or otherwiſe; for that cannot be to the prejudice of any: nay, as hath beene ſaid, a diſſeiſor that hath a wrongfull eſtate may obtaine a releaſe of the diſſeiſee, and that is not within the body of the act, and conſequently ſtandeth not in need of any proviſo to protect him.

(5 Rep. 60.)

[*c*] 34 H. 8. Dier 52.

And therefore [*c*] if there be tenant for life, the remainder in fee by lawfull and juſt title, he in the remainder may obtaine and get the pretenced right or title of any ſtranger, not only for that the particular eſtate and the remainder are all one, but for that it is a meane to extinguiſh the ſeeds of troubles and ſuits, and cannot be to the prejudice of any, as hath beene ſaid. And where the ſtatute ſaith, (being in lawfull poſſeſſion by taking the yearely rent, &c.) thoſe words are but explanatory, and put for example; for howſoever he be lawfully ſeiſed in poſſeſſion, reverſion, or remainder, it ſufficeth though he never tooke profit. But the matter obſervable upon this proviſo, which is worthy of obſervation, is, that if a diſſeiſor make a leaſe for life, lives, or yeares, the remainder for life, in tayle, or in fee, he in remainder cannot take a promiſe or covenant, that when the diſſeiſee hath entred upon the land, or recovered the ſame, that then he ſhould convey the land to any of them in remainder, thereby to avoid the particular eſtate, or the intereſt or eſtate of any other; for the words of the proviſo be

(buy,

(buy, obtaine, get, or have by any reaſonable way or meane) and that is not by promiſe or covenant to convey the land after entry or recovery; for that is neither lawfull, being againſt the expreſſe purview of the body of the act, and not reaſonable, becauſe it is to the prejudice of a third perſon. But the reaſonable way or meane intended by the ſtatute, is by releaſe or confirmation, or ſuch conveyances as amount to as much: and this agreeth with the letter of the law, viz. the pretenced right or title of any other perſon; and rights and titles are by releaſe or confirmation, as by reaſonable wayes and meanes lawfully transferred and extinct: and the words of promiſe or covenant, &c. which are prohibited by the body of the act, are omitted in the proviſo.

"*Relinquiſt le poſſeſſion, &c.*" This muſt be underſtood, that before livery of ſeiſin upon the feoffement, *A. de B.* departed out of the houſe; for otherwiſe the livery and ſeiſin ſhould be void, becauſe *A. de B.* was in poſſeſſion. And *Littleton* here ſaith, *per un fait de feoffment*, ſo as albeit the deed were made before the departure it is not materiall; but the departure muſt be before the livery of ſeiſin, for that doth worke the diſſeiſin. And yet that which *Littleton* ſaith is true, that the feoffement was the cauſe that he reliquiſhed his poſſeſſion; for otherwiſe he would not have done it. (2 Rep. 51. Aut. 48. b.)

But admit that *A. de B.* had departed for any other cauſe, yet if *F. de G.* enter and enfeoffe certaine barretors or extortioners, or any other with warrantie, this is a warrantie that commenceth by diſſeiſin, for that the feoffement worketh a diſſeiſin.

Sect. 702.

ITEM, ſi home que nul droit ad d'entrer en auters tenements, entra en meſmes les tenements, et incontinent ent fait un feoffement as auters per ſon fait ove garrantie, et deliver a eux ſeiſin, cel garrantie commence per diſſeiſin, pur ceo que le diſſeiſin et le feoffement fueront faits quaſi uno tempore. *Et que ceo eſt ley, poiez veier en un plee* * M. 11 Ed. 3. *en un briefe de* formedon *en le reverter.*

ALSO, if a man which hath no right to enter into other tenements, enter into the ſame tenements, and incontinently make a feoffement therof to others by his deed with warranty, and deliver to them ſeiſin, this warranty commence by diſſeiſin, becauſe the diſſeiſin and feoffment were made as it were at one time. And that this is law, you may ſee in a plee *M.* 11 *E.* 3. in a writ of *formedon* in the reverter.

THIS doth explaine that which hath beene ſaid before. And albeit *Littleton* uſeth the words (and incontinently thereof make a feoffement); and that in this caſe of *Littleton* the diſſeiſin and feoffment were made (*quaſi uno tempore*), yet if the diſſeiſin were made to the intent to make a feoffment with warrantie, albeit the feoffement be long after this (as hath beene ſaid) is a warrantie that commenceth by diſſeiſin. See before in the Chapter of Releaſes. (5 Rep. 79.) 46 E. 3. 6. [270. a.]

Michm.

* *M.* 11.—*anno* xxxi. L. and M. and Roh.

[d] 31 E. 3. tit. Garr. 28.

"*Mich.* 11 *E.* 3." This is miſtaken, and ſhould be [d] 31 *E.* 3. and ſo is the originall, which caſe you ſhall ſee in Maſter *Fitzherbert's* Abridgement, for there is no booke at large of that yeare. Hereby you may perceive that learned men looke not only to the caſes reported, but unto records, as you may ſee *Littleton* did; for *Fitzherbert* put this caſe in print long after, as elſewhere hath beene ſhewed.

Sect. 703.

GARRANTY lineal eſt, lou home ſeiſie de terres en fee, †fait feoffement per ſon fait a un auter, et oblige luy et ſes heires a garranty, et ad iſſue et moruſt, et le garrantie diſcendiſt a ſon iſſue, ceo eſt lineal garranty. Et la cauſe pur ceo que ‡ eſt dit lineal garrantie, n'eſt pur ceo que le garranty diſcendiſt de le pier a ſon heire; mes la cauſe eſt, pur ceo que ſi nul tiel fait ove garranty fuiſſoit fait per le pier, donque le droit de les tenements diſcenderoit al heire, et l'heire conveyeroit le diſcent de ‖ſon pier, &c.

WARRANTY lineall is, where a man ſeiſed of lands in fee maketh a feoffement by his deed to another, and bindes himſelfe and his heires to warrantie, and hath iſſue and die, and the warranty deſcend to his iſſue, that is a lineal warranty. And the cauſe why this is called lineall warrantie, is not becauſe the warrantie deſcendeth from the father to his heire; but the cauſe is, for that if no ſuch deed with warrantie had beene made by the father, then the right of the tenements ſhould deſcend to the heire, and the heire ſhould convey the diſcent from his father, &c.

(1 Rep. 1.)

"*GARRANTY lineal, &c.*" A warrantie lineall is a covenant reall annexed to the land by him which either was owner, or might have inherited the land, and from whom his heire lineall or collaterall might by poſſibilitie have claimed the land as heire from him that made the warranty; whereof *Littleton* himſelfe putteth divers caſes, which ſhall be explained in their proper places. And in this caſe put in this Section, *Littleton* (once for all) ſheweth, that the reaſon of the example here put, is becauſe if no ſuch alienation with warrantie (for ſo is *Littleton* to be intended) had beene made, the very lands had deſcended to the heire, ſo as the caſe being put of lands in fee ſimple, the alienation without the warrantie had barred the heire. And note, that it is called a lineall warrantie (1), not becauſe it muſt deſcend upon the lineall heire; for be the heire lineall or collaterall, if by poſſibilitie he might claime the land from him that made the warrantie, it is lineall; having regard to the warrantie, and title of the land. And alſo it is called lineall, in reſpect that the warrantie made by him that had no right or poſſibility of right to the land, is called collaterall, in regard that it is collaterall to the title of the land. And it is alſo to be obſerved, that in all the caſes that *Littleton* hath put, or ſhall put,

(Poſt. 371. a. 375. a.)

(3 Rep. 59.) 35 E. 3. Garr. 73.

† *et* added L. and M. and Roh.
‡ *ceo* added L. and M. and Roh.
‖ *ſon—le*, L. and M. and Roh.

put, the lineall or collaterall warranty doth binde the heire; and therefore the ſucceſſour claiming in another right ſhall not be bound by the warrantie of any naturall anceſtour. For which cauſe [c] in a *juris utrum* brought by a parſon of a church, the collaterall warrantie of his anceſtour is no barre, for that he demandeth the land in the right of his church in his politike capacitie, and the warrantie deſcendeth on him in his naturall capacitie. [d] But ſome have holden, that if a parſon bring an aſſiſe, that a collaterall warranty of his anceſtour ſhall binde him; and their reaſon is, for [370. b.] that the aſſiſe is brought of his poſſeſſion and feiſin, and he ſhall recover the meane profits to his owne uſe: but ſeeing he is ſeiſed of the freehold, whereof the aſſiſe is brought *in jure eccleſiæ*, which is in another right than the warrantie, it ſeemeth that it ſhould not be any barre in the aſſiſe. The like law is of a biſhop, archdeacon, deane, maſter of an hoſpitall, and the like, of their ſole poſſeſſions, and of the prebend, vicar, and the like.

[c] 27 H. 6. Garr. 48.

[d] 34 E. 3. Garr. 71.

"*Et oblige luy et ſes heircs.*" [*] King *H.* 3. gave a mannor to *Edmund* earle of Cornwall, and to the heires of his body, ſaving the poſſibilitie of reverter, and died: the earle, before the ſtatute of *W.* 2. *cap.* 1. *de donis conditionalibus*, by deed gave the ſaid mannor to another in fee with warrantie in exchange for another mannor, and after the ſaid ſtatute in the 28 yeare of *E.* 1. dieth without iſſue, leaving aſſets in fee ſimple; which warrantie and aſſets deſcended upon king *E.* 1. as coſin germaine and heire of the ſaid earle, viz. ſon and heire of king *Henry* the third, brother of *Richard* earle of Cornwall, father of the ſaid earle *Edmund*. And it was adjudged, that the king, as heire to the ſaid earle *Edmund*, was by the ſaid warrantie and aſſets barred of the poſſibilitie of reverter, which he had expectant upon the ſaid gift, albeit the warrantie and aſſets deſcended upon the naturall body of king *E.* 1. as heire to a ſubject; and king *E.* 1. claimed the ſaid mannor, as in his reverter *in jure coronæ* in the capacity of his body politike, in which right he was ſeiſed before the gift. In this caſe, how by the death of the ſaid earle *Edmund* without iſſue, the king's title by reverter, and the warrantie and aſſets came together, and that the warrantie was collaterall, yet the king ſhall not be barred without aſſets, as a ſubject ſhall be; and many other things are to be obſerved in this caſe, which the learned reader will obſerve. (1)

[*] 46 Aſſ. 6. 6 E. 3. 56. Pl. Com. 231. & 553, 554. (8 Rep. 1. Ant. 19. b.)

Vide 27 H. 6. Garr. 48. 34 E. 3. Garr. 71.

Vide Sect. 711, 712. (Hob. 339. 9 Rep. 132. b. Vaug. 379.)

Sect. 704. (8 Rep. 51.)

*CAR ſi ſoit pier et fits, et le fits purchaſe * terres en fee, et le pier de ceo diſſeiſiſt ſon fits, et † aliena a un auter en fee per ſon fait, et per meſme le fait oblige luy et ſes heires a garranter meſmes les tenements, &c. et le pier moruſt; ore eſt le fits barre d'aver*

FOR if there be father and ſonne, and the ſonne purchaſe lands in fee, and the father of this diſſeiſeth his ſonne, and alieneth to another in fee by his deed, and by the ſame deed binde him and his heires to warrant the ſame tenements, &c. and

* *terres*—*tenements*, L. and M. and Roh. † *ceo* added L. and M. and Roh.

(1) [See Note 391.]

d'aver les dits tenements; car il ne pbit per aſcun-ſuit, ne per auter meane de la ley, aver meſmes les terres per cauſe del dit garrantie. Et ceo eſt un collateral garranty; et uncore le garranty diſcendiſt lyncalment de le pier a le fits.

and the father dieth; now is the ſon barred to have the ſaid tenements; for he cannot by any ſuit, nor by other meane of law, have the ſame lands by cauſe of the ſaid warrantie. And this is a collaterall warrantie; and yet the warrantie deſcendeth lineally from the father to the ſonne.

Sect. 705.

MES pur ceo que ſi nul tiel fait ove garrantie uſt eſtre fait, le fits en nul maner puiſſoit conveyer le title que il ad a les tenements de ſon pier a luy, entant que ſon pier n'avoit aſcun eſtate en droit en les tenements; pur ceo tiel garrantie eſt appel collateral garrantie, entant que celuy que fiſt le garrantie eſt collateral a le title de les tenements: et ceo eſt a tant a dire, que ceſtuy a que le garrantie diſcendiſt, ne puiſſoit a luy conveyer le title que il ad de les tenements per my ceſtuy que fiſt le garrantie, en cas que nul tiel garrantie fuit fait.

BUT becauſe if no ſuch deed with warrantie had beene made, the ſonne in no manner could convey the title which hee hath to the tenements from his father unto him, inaſmuch as his father had no eſtate in right in the lands; [371. a.] wherefore ſuch warrantie is called collaterall warrantie, inaſmuch as he that maketh the warrantie is collaterall to the title of the tenements: and this is aſmuch to ſay, as hee to whom the warrantie deſcendeth, could not convey to him the title which hee hath in the tenements by him that made the warrantie, in caſe that no ſuch warrantie were made.

5 E. 3. 14.
46 E. 3. 6.
19 H. 8. 12.
8 R. 2.
Gerr. 100.
Vid. Sect. 716.

HERE *Littleton* putteth an example, proving that it is not called lineall, becauſe it deſcendeth lineally from the father to the ſon; for in this caſe the warrantie deſcendeth lineally, and yet is a collaterall warrantie. In this example you muſt intend that the diſſeiſin was not of intent to alien with warrantie to barre the ſonne; but here the diſſeiſin being done to the ſonne, without any ſuch intent, the alienation afterwards with warrantie doth barre the ſonne; becauſe that albeit the warrantie doth lineally deſcend, yet ſeeing the title is collaterall, that is, that the ſonne claimeth not the land as heire to his father, therefore in reſpect of the title it is a collaterall warrantie. And thus doth *Littleton* agree [e] with the authoritie of our bookes. So as the diverſities do ſtand thus. Firſt, where the diſſeiſin and feoffement are *uno tempore*, and where at ſeverall times. Secondly, where the diſſeiſin is with intent to alien with warrantie, and where the diſſeiſin is made without ſuch intent, and the alienation with warrantie afterwards made.

[e] 46 E. 3. 6.
5 E. 3. 14.
19 H. 8. 12.

Sect. 706.

ITEM, ſi ſoit aiel, pier, et fits, et le aiel ſoit diſſeiſie, en que poſſeſſion le pier releas per ſon fait ove garrantie, &c. et moruſt, et puis l'aiel moruſt; ore le fits eſt barre d'aver les tenements per le garrantie del pier. Et ceo eſt appel lineal garrantie, pur ceo que ſi nul tiel garrantie fuit, le fits ne puiſſoit conveyer le droit de les tenements a luy, ne monſtre coment il eſt heire al aiel forſque per meane del pier.

ALSO, if there bee grandfather, father, and ſon, and the grandfather is diſſeiſed, in whoſe poſſeſſion the father releaſeth by his deed with warrantie, &c. and dieth, and after the grandfather dieth; now the ſon is barred to have the tenements by the warranty of the father. And this is called a lineall warrantie, becauſe if no ſuch warrantie were, the ſon could not convey the right of the tenements to him, nor ſhew how hee is heire to the grandfather but by means of the father.

HERE *Littleton* putteth an example where the ſon muſt claime the land as heire to his grandfather; and yet becauſe hee cannot make himſelfe heire to his grandfather but by his father, it is 1 H. 4. 33. 35 E. 3. Gar. 73. Dieall.

And this is to bee obſerved, that the warrantie in this caſe deſcended upon the ſon, before the diſſent of the right, which happened by the death of the grandfather, in whom the right was. *Vide Littleton Cap. de Releaſes*, and after in this Chapter, *Sect.* 707, and 741.

"Per releaſe per ſon fait ove garrantie." [*f*] It is to be knowne, that upon everie conveyance of lands, tenements, or hereditaments, as upon fines, ſeoffments, gifts, &c. releaſes and confirmations made to the tenant of the land, a warrantie may bee made, albeit hee that makes the releaſe or confirmation, hath no right to the land, &c. but ſome doe hold, that by releaſe or confirmation, where there is no eſtate created, or tranſmutation of poſſeſſion, a warrantie cannot be made to the aſſignee. (3 Rep. 59. Ant. 265. a. Poſt. 386.) [*f*] 14 E. 3. Voucher 108. 16 E. 3. ibid. 87. 18 E. 3. ibid. 6. 10 E. 3. 52. 21 E. 3. 27. 11 H. 4. 27. (Poſt. 385. a.)

[371. b.]

14 E. 3. Cont. de Vouch. 22. 12 H. 7. 1. Vide Sect. 738. 738. 745.

Sect. 707.

ITEM, ſi home ad iſſue deux fits et eſt diſſeiſie, et l'eigne fits releſſa al diſſeiſor per ſon fait ove garranty, &c. et moruſt ſans iſſue, et apres ceo le pier moruſt, ceo eſt un lineall garrantie al puiſne fits, pur ceo que coment que l'eigne fits moruſt en la vie le pier, uncore pur ceo que per poſſibilitie il puiſſoit eſtre, que il puiſſoit conveier a luy le title del terre per ſon eigne frere,

ALSO, if a man hath iſſue two ſonnes and is diſſeiſed and the eldeſt ſonne releaſe to the diſſeiſor by his deed with warrantie, &c. and dies without iſſue, and afterwards the father dieth, this is a lineall warrantie to the younger ſonne, becauſe albeit the eldeſt ſonne died in the life of the father, yet by poſſibilitie it might have beene, that hee might convey

*frere, ſi mul tiel garrantie fuiſſoit. Car il puiſſoit eſtre, que apres la mort le pier l'eigne frere entroit en les tenements et moruſt ſans iſſue, et donque le puiſne fits conveyera a luy le title per l'eigne * fits. Mes en tiel cas, ſi le puiſne fits releſſe ove garrantie a le diſſeiſor, et moruſt ſans iſſue, ceo eſt un collateral garrantie al eigne † fits, pur ceo que de tiel terre que fuit al pier, l'eigne per nul poſſibilitie poit conveyer a luy le title per meane de le puiſne ‡ fits.*

convey to him the title of the land by his elder brother, if no ſuch warrantie had beene. For it might bee, that after the death of the father the elder brother entred into the tenements and died without iſſue, and then the yonger ſonne ſhall convey to him the title by the elder ſon. But in this caſe if the younger ſonne releaſeth with warrantie to the diſſeiſor, and dieth without iſſue, this is a collaterall warrantie to the elder ſon, becauſe that of ſuch land as was the father's, the elder by no poſſibilitie can convey to him the title by meanes of the younger ſon.

35 E. 3. Gar. 73. 11 H. 4. 33. (1 Rep. 66.)

HERE *Littleton* putteth an example, where the heire that is to be barred by the warrantie, is not to make his diſcent by him that made the warrantie, as in the caſe before; and yet becauſe by poſſibilitie he might have claimed by the eldeſt ſonne, if he had ſurvived the father, and died without iſſue, and ſo the younger brother might by poſſibilitie have beene heire to him, the warrantie is lineall.

And here it is to be noted, that the warrantie of the eldeſt ſonne deſcended before the right deſcended; whereof more ſhall be ſaid hereafter, *Sect.* 741.; and the opinion of *Littleton* in this caſe is holden for law againſt the opinions in 35 *E.* 3. *Gar.* 73.

9 E. 3. 16. 38 E. 3. 21. 46 E. 3. 26. 8 R. 2. Gar. 101. (2 Roll. Abr. 773.)

"*Mes en tiel caſe le puiſne fits releaſe ove garrantie, &c.*" This warrantie in this caſe is collaterall to the eldeſt ſonne, and to the iſſues of his bodie; but if the eldeſt ſonne dieth without iſſue of his bodie, then the warrantie is lineall to the iſſues of the bodie of the youngeſt: and ſo the warrantie that was collaterall to ſome perſons, may become lineall to others.

Sect. 708. [372. a]

ITEM, ſi tenant en le taile ad iſſue trois fits, et diſcontinue le taile en fee, et le mulnes fits releſſa per ſon fait al diſcontinuee, et oblige luy et ſes heires a garrantie, &c. et puis le tenant en le taile moruſt, et le mulnes fits moruſt ſans iſſue, ore l'eigne fits eſt barre d'aver aſcun recoverie per briefe de formedon, *pur ceo que le garrantie del mulnes frere eſt collateral a luy, entant que il ne poit per nul manner conveyer a luy per force del*

ALSO, if tenaunt in taile hath iſſue three ſonnes, and diſcontinue the tayle in fee, and the middle ſon releaſe by his deed to the diſcontinuee, and binde him and his heires to warrantie, &c. and after the tenant in taile dieth, and the middle ſon dieth without iſſue, now the eldeſt ſonne is barred to have any recoverie by writ of *formedon*, becauſe the warrantie of the middle brother is collaterall to him, inaſmuch

* *fits* not in L. and M. nor Roh.
† *fits* not in L. and M. nor Roh.
‡ *fits* not in L. and M. nor Roh.

del taile aſcun diſcent per le mulnes, et pur ceo c'eſt un collateral garrantie. Mes en ceſt cas ſi l'eigne fits devie ſans iſſue, ore le puiſne frere poit bien aver un briefe de formedon *en le diſcender, et recovera meſme le terre, pur ceo que le garrantie del mulnes eſt lineal al fits puiſne, pur ceo que il puiſſoit eſtre que per poſſibilitie le mulnes puiſſoit eſtre ſeiſie per force del taile apres la mort ſon eigne frere, et donque le puiſne frere puiſſoit conveyer ſon title de diſcent per le mulnes.*

much as hee can by no meanes convey to him by force of the tayle any diſcent by the middle, and therefore this is a collateral warrantie. But in this caſe if the eldeſt ſonne die without iſſue, now the youngeſt brother may well have a writ of *formedon* in the diſcender, and ſhall recover the ſame land, becauſe the warrantie of the middle is lineall to the youngeſt ſon, for that it might bee that by poſſibilitie the middle might bee ſeiſed by force of the taile after the death of his eldeſt brother, and then the youngeſt brother might convey his title of diſcent by the middle brother.

HEREBY it alſo appeareth, that a warrantie that is collaterall in reſpect of ſome perſons, may afterwards become lineall in reſpect of others. Whereupon it followeth, [*] that a collateral warrantie doth not give a right, but bindeth only a right ſo long as the ſame continueth: but if the collaterall warrantie be determined, removed, or defeated, the right is revived. [*f*] And yet in an aſſiſe the plaintiffe hath made his title by a collateral warrantie. (Dr. and Stud. 153. b.) 8 R. 2. Gar. 101. [*] 43 Aſſ. 44. 24 H. 8. tit. Taile. Br. 7 H. 5, 6. tit. Aſſ. 359. 34 E. 3. [*f*] 16 Aſſ. p. 16.

Droit 29. 19 H. 6. 59. 21 H. 7. 40. 5 H. 7. 29. 3 H. 7. 9. b. 27 Aſſ. 74. 29 Aſſ. 30. 43 Aſſ. 8. 14 H. 4. 13. 19 H. 6. 60.

"*Barre*" is a word common aſwell to the Engliſh as to the French, of which commeth the nowne, a bar, *barra*. It ſignifieth legally a deſtruction for ever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and ſignifieth barre, as we uſe it; and it is called a plea in barre, when ſuch a barre is pleaded. Here *Littleton* putteth an example of a barre of an eſtate taile by a collaterall warranty. It is to be obſerved, that in ſome caſes an eſtate taile may be barred by ſome acts of parliament made ſince *Littleton* wrote; and in ſome caſes an eſtate taile cannot be barred, which might when *Littleton* wrote have been barred. For example, if tenant in tayle levie a fine with proclamations according to the ſtatute, this is a barre to the eſtate taile, but not to him in reverſion or remainder, if hee maketh his claime, or purſue his action within five yeares after the ſtate taile ſpent. (Doc. Plac. 54.) (Dr. and Stud. 56. a.) 4 H. 7. c. 24. & 32 H. 8. c. 36. (10 Rep. 43.)

[*b*] If a gift be made to the eldeſt ſonne, and to the heires of his bodie, the remainder to the father and to the heires of his bodie, the father dieth, the eldeſt ſonne levieth a fine with proclamations, and dieth without iſſue; this ſhall barre the ſecond ſonne, for the remainder deſcended to the eldeſt. [*b*] Daliſon 2 El. & 7 El. Vide Lib. 3. fol. 84. le caſe de Fines. (3 Leon. 10.)

[372. b.]

If tenant in taile be diſſeiſed, or have a right of action, and the tenant of the land levie a fine with proclamations, and five yeares paſſe, the right of the eſtate taile is barred. (Ant. 120. b. 9 Rep. 104. Plowd. 374. a. 375. a.

Cro. Eliz. 896. Noy 46. Dyer 3. b. 183. a.)

[*b*] If tenant in taile in poſſeſſion, or that hath a right of entrie, bee attainted of high-treaſon, the eſtate taile is barred, and the land is forfeited to the king; and none of theſe were barred when *Littleton* [*b*] 26 H. 8. cap. 13. 33 H. 8. cap. 20. 5 E. 6. c. 11. Stauf. Pl. Coron. 18.

Littleton wrote. A lineall warrantie and aſſets was a barre to the eſtate taile when *Littleton* wrote; whereof more ſhall be ſaid hereafter.

[c] 12 E. 4. 19. Talarum's caſe.

[c] A common recoverie with a voucher over, and a judgement to recover in value, was a barre of the eſtate taile when *Littleton* wrote. [d] And of common recoveries there bee two ſorts, viz. one with a ſingle voucher, and another with a double voucher, and that is more common and more ſafe: there may be more vouchers over.

[d] Vide devant Sect. 690. Vid. Lib. 3. fol. 5. Coppledick's caſe, & fol. 94. 97. 106. Lib. 1. fol. 62. Capel's caſe. Lib. 2. fol. 16. 52. 74. 77. Lib. 6. fol. 41, 42. Lib. 10. fol. 37. Marie Portington's caſe. (Ante 335. a.)

[e] 38 H. 8. taile Br. 41. Pl. Com. fol. 555. 29 H. 8. Dier 52.

[e] If the king had made a gift in taile, and the donee had ſuffered a common recoverie, this ſhould have barred the eſtate taile in *Littleton*'s time, but not the reverſion or remainder in the king. And ſo if ſuch a donee had levied a fine with proclamations after the ſtatute of 4 *H.* 7. this had barred the eſtate taile, although the reverſion was in the king. (1)

[f] 34 H. 8. cap. 20.

[f] But ſince *Littleton* wrote, a common recoverie had againſt tenant in taile of the king's gift, or ſuch a fine levied by him, the reverſion continuing in the crowne, is no barre to the eſtate taile by the ſtatute of 34 *H.* 8. (2) And where the words of the ſtatute be (whereof the reverſion or remainder at the time of ſuch recoverie had ſhall be in the king) theſe ten things are to be obſerved upon the conſtruction of that act. (3)

First, that the eſtate taile muſt bee created by a king, and not by any ſubject, albeit the king be his heire to the reverſion; for the preamble ſpeakes of gifts made to ſubjects, and none can have ſubjects but the king. And alſo in the preamble it is ſaid (for ſervice done to the kings of the realme,) and the body of the act referreth to the preamble.

[g] Trin. 23 Eliz. inter Dively & Aſhton reſolved in the Court of Wards. Lib. 2. fol. 15 & 16, in Wiſeman's caſe.

[g] And therefore if the duke of *Lancaſter* had made a gift in taile, and the reverſion deſcended to the king, yet was not that eſtate taile reſtrained by that ſtatute; and ſo of the like.

Secondly, if the king grant over the reverſion, then a recoverie ſuffered will barre the ſtate taile, becauſe the king had no reverſion at the time of the recoverie.

Lib. 8. fol. 77, 78. the Lord Stafford's caſe. (8 Roll. 394.)

Thirdly, if the king make a gift in taile, the remainder in taile, or grant the reverſion in taile, keeping the reverſion in the crowne, a recoverie againſt tenant in taile in poſſeſſion ſhall neither barre the eſtate taile in poſſeſſion by the expreſſe purview of the ſtatute, nor by conſequence the ſtate in remainder or reverſion; for that the reverſion or remainder cannot be barred, but where the eſtate taile in poſſeſſion is barred.

Lib. 2. fol. 15, 16. Wiſeman's caſe. Lib. 2. fol. 52. Cholmeley's caſe.

Fourthly, if a ſubject make a gift in taile, the remainder to the king in fee, albeit the words of the ſtatute be, (whereof the reverſion or remainder of the ſame, &c.) yet ſeeing the eſtate in taile was not created by a king, as hath beene ſaid, the eſtate taile may bee barred by a common recoverie.

(Mo. 115. 195. 2 Rep. 15. b. 1 Cro. 430.)

Fifthly, if Prince *Henrie*, ſonne of *Henrie* the Seventh, had made a gift in taile, the remainder to *Henrie* the Seventh in fee, which remainder by the death of *Henrie* the Seventh had deſcended to *Henrie* the Eighth, ſo as he had the remainder by diſcent; yet might tenant in taile, for the cauſe aforeſaid, barre the eſtate taile by a common recoverie.

Sixthly,

(1) [See Note 322.]
(2) Upon this act ſee Mr. Cruiſe's Eſſay on Recoveries, 2d ed. 255.
(3) [See Note 323.]

Sixthly, the word (remainder) in the ſtatute is no vaine word; for the words of the preamble be, the king hath given or granted, or otherwiſe provided to his ſervants and ſubjects. The word (reverſion) in the body of the act hath reference to theſe words (given or granted); and (remainder) hath reference to theſe words (otherwiſe provided.) As if the king in conſideration of money, or of aſſurance of land, or for other conſideration by way of proviſion, procure a ſubject by deed indented and inrolled, to make a gift in taile to one of his ſervants and ſubjects for recompence of ſervice, or other conſideration; the remainder to the king in fee, and all this appeare of record; this is a good proviſion within the ſtatute, and the tenant in taile cannot by a common recoverie barre the eſtate taile. So it is, if the remainder bee limited to the king in taile; but if the remainder bee limited to the king for yeares, or for life, that is no ſuch remainder as it is intended by the ſtatute, becauſe it is of no remainder of continuance, as it ought to be, as it appeareth by the preamble; and it ought to have ſome affinitie with a reverſion, wherewith it is joyned. Lib. 2. fol. 16. Wiſeman's caſe.

Seventhly, where a common recoverie cannot barre the ſtate taile by force of the ſaid ſtatute, there a fine levied in fee, in taile, for lives, or yeares, with proclamations according to the ſtatutes, ſhall not barre the ſtate taile, or the iſſue in taile, where the reverſion or remainder is in the king, as is aforeſaid, by reaſon of theſe words in the ſaid act (the ſaid recovery, or any other thing or things hereafter to be had, done, or ſuffered by or againſt any ſuch tenant in taile to the contrary notwithſtanding), which words include a fine levied by ſuch a donee, and reſtraineth the ſame. [373. a.] So reſolved Paſch. 31 Eliz. Rot. 1645, in Notley's caſe in Communi Banco. (8 Rep. 77.)

Eightly, but where a common recovery ſhall barre the eſtate taile, notwithſtanding that ſtatute, there a fine with proclamations ſhall barre the ſame alſo.

Ninthly, where the ſaid latter words of the ſtatute be (had, done, or ſuffered by or againſt any ſuch tenant in taile,) the ſenſe and conſtruction is, where tenant in taile is partie or privie to the act, be it by doing or ſuffering that which ſhould worke the barre, and not by meere permiſſion, he being a ſtranger to the act. (1) (3 Cro. 430. Cro. Eliz. 595. Sid. 166. 4 Leon. 40. Moor 467.)

As if tenant in tayle of the gift of the king, the reverſion to the king expectant, is diſſeiſed, and the diſſeiſor levie a fine, and five yeares paſſe, this ſhall barre the eſtate taile (2): and ſo if a collaterall anceſtour of the donee releaſe with warrantie, and the donee ſuffer the warrantie to deſcend without any entry made in the life of the anceſtour, this ſhall binde the tenant in tayle, becauſe he is not party or privie to any act, either done or ſuffered by or againſt him. So holden Trin. 39 Eliz. Rot. 1914, inter Stratford & Dover in Communi Banco. (Hob. 332. 2 Roll. Abr. 773.)

Tenthly, albeit the preamble of the ſtatute extend onely to gifts in taile made by the kings of England before the act (viz. hath given and granted, &c.), and the body of the act referreth to the preamble (viz. that no ſuch feigned recovery hereafter to be had againſt ſuch tenant in taile), ſo as this word (ſuch) may ſeeme to couple the body and the preamble together; yet in this caſe (ſuch) ſhall be taken for ſuch in equall miſchiefe, or in like caſe; and by divers parts of the act it appeareth that the makers of the act intended to extend it to future gifts; and ſo is the law taken at this day without queſtion.

A recovery

(1) [See Note 324.] (2) [See Note 325.]

33 E. 3. Judgement 252. 9 H. 6. 55. 10 H. 6. 5. 14 E. 4. 5. b. 15 E. 4. 8. F. N. B. 134. b. Pl. Com. 237. 28 E. 3. 95. F. N. B. 28. L

A recovery in a writ of right againſt tenant in taile without a voucher, is no barre of any gift in taile.

If tenant in taile the remainder over in fee ceſſe, and the lord recover in a *ceſſavit*, this ſhall not barre the eſtate taile, for the iſſue ſhall recover in a *formedon*; neither were either of theſe barres when *Littleton* wrote. But let us now heare *Littleton*.

Sect. 709.

ITEM, ſi tenant en taile diſcontinua le taile, et ad iſſue et devy, et l'uncle del iſſue releſſa al diſcontinuee ove garrantie, &c. et moruſt ſans iſſue, ceo eſt collateral garranty al iſſue en taile, pur ceo que le garrantie diſcendiſt ſur l'iſſue, le quel ne poit joy conveyer a le taile per meane de ſon uncle.

ALSO, if tenant in taile diſcontinue the taile, and hath iſſue and dieth, and the uncle of the iſſue releaſe to the diſcontinuee with warrantie, &c. and dieth without iſſue, this is a collaterall warranty to the iſſue in tayle, becauſe the warranty deſcendeth upon the iſſue, that cannot convey himſelfe to the entayle by meanes of his uncle.

Pl. Com. fol. 307. a. in Slanington's caſe. (2 Roll. Abr. 745.) (Poſt. 374. b.) (3 Rep. 59.)

(Ante 6. b.)

THE reaſon wherefore the warrantie of the uncle having no right to the land entailed ſhall barre the iſſue in tayle is, for that the law preſumeth that the uncle would not unnaturally diſherit his lawfull heire, being of his owne bloud, of that right which the uncle never had, but came to the heire by another meane, unleſſe hee would leave him greater advancement. *Nemo præſumitur alienam poſteritatem ſuæ prætuliſſe.* And in this caſe the law will admit no proofe againſt that which the law preſumeth. And ſo it is of all other collaterall warranties; for no man is preſumed to doe any thing againſt nature.

[k] 11 H. 4. 55. 10 Eliz. Dier 271.

[l] 7 H. 4. 9.

[k] And the like holdeth in ſome other caſes: as if a rent be behinde for twentie yeares, and the lord make an acquittance for the laſt that is due, all the reſt are preſumed to be paid; and the law will admit no proofe againſt this preſumption (3). [l] So if a man be within the foure ſeas, and his wife hath a childe, the law preſumeth that it is the childe of the huſband; and againſt this preſumption the law will admit no proofe. (4)

[m] 3 E. 3. Corone Staſ.

Bracton lib. 1. cap. 9.

[n] Rot. Parliament. 50 E. 3. num. 77.

[m] If a man that is innocent be accuſed of felony, and for fear flieth from the ſame, albeit he judicially acquitteth himſelfe of the felonie, yet if it be found that he fled for the felonie, [373. b.] he ſhall, notwithſtanding his innocencie, forfeit all his goods and chattels, debts and duties; for as to the forfeiture of them, the law will admit no proofe againſt the preſumption in law grounded upon his flight: and ſo in many other caſes. But yet the generall rule is, *Quod fiabitur præſumptioni donec probetur in contrarium*; but, as you ſee, it hath many exceptions.

[n] It hath beene attempted in parliament, that a ſtatute might be made, that no man ſhould be barred by a warrantie collaterall, but

(3) [See Note 326.] (4) But ſee ant. 214. a. note 2.

but where affets defcend from the ſame anceſtor (1); but it never tooke effect, for that it ſhould weaken common aſſurances. (2)

Sect. 710.

ITEM, ſi le tenant en tayle ad iſſue deux files et moruſt, et l'eigne entra en le entierty, et ent fait un feoffement en fee ove garrantie, &c. et puis l'eigne file moruſt ſans iſſue; en ceſt cas le puiſne file eſt barre quant al un moitie, et quant al auter moitie el n'eſt pas barre. Car quant a la moitie que affiert a le puiſne file, el eſt barre, pur ceo que quant a cel part el ne poit conveyer le diſcent per my le maine de ſon eigne ſoer, et pur ceo quant a cel moitie, ceo eſt un collateral garrantie. Mes quant al auter moity, que affiert a ſon eigne ſoer, le garrantie n'eſt pas barre a le puiſne ſoer, pur ceo que el poit conveyer ſon diſcent quant a cel moitie que affiert a ſon eigne ſoer per meſme le eigne ſoer, iſſint quant a ceſt moitie que affiert al eigne ſoer, le garrantie eſt lineal al puiſne ſoer.*

ALSO, if the tenant in tayle hath iſſue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, &c. and after the elder daughter dieth without iſſue; in this caſe the younger daughter is barred as to the one moitie, and as to the other moitie ſhee is not barred. For as to the moity which belongeth to the younger daughter, ſhee is barred, becauſe as to this part ſhee cannot convey the diſcent by meanes of her elder ſiſter, and therefore as to this moitie, this is a collaterall warrantie. But as to the other moitie, which belongeth to her elder ſiſter, the warrantie is no bar to the younger ſiſter, becauſe ſhe may convey her diſcent as to that moitie which belongeth to her elder ſiſter by the ſame elder ſiſter, ſo as to this moitie which belongeth to the elder ſiſter, the warrantie is lineall to the younger ſiſter.

Sect. 711.

ET nota, que quant a celuy que demanda fee ſimple per aſcun de ſes aunceſters, il ſerra barre per warrantie lineal que diſcendiſt ſur luy, ſinon que ſoit reſtraine per aſcun eſtatute.

AND note, that as to him that demandeth fee ſimple by any of his anceſtors, he ſhall be barred by warrantie lineall which deſcendeth upon him, unleſſe he be reſtrained by ſome ſtatute.

Sect. 712.

MES il que demande fee taile per briefe de formedon *en diſcender, ne ſerra my barre per lineal garrantie,*

BUT hee that demandeth fee tayle by writ of *formedon* in *diſcender*, ſhall not bee barred by lineall warrantie,

* *part—moyte que affiert a luy*, L. and M. and Roh.

(1) [See Note 327.] (2) [See Note 328.]

tie, ſinon que il ad aſſets per diſcent en fee ſimple per meſne l'auncеſter que fiſt le garranty. Mes collateral garrantie eſt barre a celuy que demanda fee, et aury a celuy que demanda fee taile ſans aſcun auter diſcent de fee ſimple, ſinon en caſes queux ſont reſtraines per les eſtatutes, et auters caſes pur certaine cauſes, come ſerra dit en apres.

warrantie, unleſſe hee hath aſſets by diſcent in fee ſimple by the ſame anceſtour that made the warrantie. But collaterall warrantie is a barre to him that demandeth fee, and alſo to him that demandeth fee tayle without any other diſcent of fee ſimple, except in caſes which are reſtrained by the ſtatutes, and in other caſes for certaine cauſes, as ſhall be ſaid hereafter. (1)

5 E. 2. Garr. 78. Lib. 8. fol. 41. Sym's caſe.

(10 Rep. 95.)

(Ante 367. b.) (2 Cro. 217, 218.)

"*AD iſſue deux files.*" If huſband and wife, tenants in eſpeciall tayle, have iſſue a daughter, and the wife die, the huſband by a ſecond wife hath iſſue another daughter, and diſcontinueth in fee and dieth, a collaterall anceſtor of the daughters releaſeth to the diſcontinuee with warranty and dieth, the warrantie deſcendeth upon both daughters, yet the iſſue in taile ſhall bee barred of the whole; for in judgement of law the entire warrantie deſcendeth upon both of them.

(Ant. 189. a. 243. b.) See before in the Chapter of Diſcent, Sect. 398.

"*Et l'eigne enter en l'entiertie, et ent fait un feoffement, &c.*" Here it is to bee underſtood, that when one coparcener doth generally enter into the whole, this doth not deveſt the eſtate which deſcendeth by the law to the other, unleſſe ſhee that doth enter claimeth the whole, and taketh the profits of the whole; for that ſhall deveſt the freehold in law of the other parcener.

Otherwiſe it is after the parceners be actually ſeiſed, the taking of the whole profits, or any claime made by the one, cannot put the other out of poſſeſſion without an actuall putting out or diſſeiſin. And in this caſe of *Littleton*, when one coparcener [374. a.] entreth into the whole, and maketh a feoffement of the whole, this deveſteth the freehold in law out of the other coparcener.

Pl. Com. 543. (5 Rep. 51. Poſt. 377. a.)

(Sect. 398. Poſt. 393. b.)

Now ſeeing the entrie in this caſe of *Littleton* deveſted not the eſtate of the other parcener, if no further proceeding had beene, then it is to be demanded, that ſeeing the feoffement doth worke the wrong, and bee the wrong either a diſſeiſin, or in nature of an abatement, how can the warrantie annexed to that feoffement that wrought the wrong be collaterall, or binde the youngeſt ſiſter for her part? To this it is anſwered, that when the one ſiſter entreth into the whole, the poſſeſſion being void, and maketh a feoffement in fee, this act ſubſequent doth ſo explaine the entry precedent into the whole, that now by conſtruction of law ſhe was only ſeiſed of the whole, and this feoffement can bee no diſſeiſin, becauſe the other ſiſter was never ſeiſed; nor any abatement, becauſe they both made but one heire to the anceſtour, and one freehold and inheritance deſcended to them. So as in judgement of law the warrantie doth not commence by diſſeiſin or by abatement, and without queſtion her entrie was no intruſion.

Tenant in tayle hath iſſue two daughters, and diſcontinueth in fee, the youngeſt diſſeiſeth the diſcontinuee to the uſe of herſelfe and her ſiſter, the diſcontinuee outſteth her, againſt whom ſhe recovereth

(1) The obſervations of Lord Vaughan on this Section, and the comment upon it, deſerve attentive peruſal. See Vaugh. 375.

recovereth in an aſſiſe, the eldeſt agreeth to the diſſeiſin, as ſhe may, againſt her ſiſter, and become joyntenant with her. And thus is the booke in the 21 Aſſiſe [n] to be intended, the caſe being no other in effect; but *A.* diſſeiſeth one to the uſe of himſelfe and *B*, *B.* agreeth; by this he is joyntenant with *A*.

[n] 21 Aſſ. p. 19. (Ant. 180.)

[374. b.] "*Et nota, que quant a celuy que demanda fee ſimple, &c.*" In theſe two Sections there are expreſſed foure legall concluſions:

3 E. 3. 22. 4 E. 3. 28. 59. 6 E. 3. 56. 7 E. 3. 54. 67. 9 E. 3. 16. 10 E. 3. 14. 15 E. 3. Garr. 27. 20 E. 3. Ibid. 39. 25 E. 3. 50. 27 E. 3. 83. 41 E. 3. Garr. 16. Mich. 38 E. 3. Coram Rege Abbot de Colcheſter's caſe. 45 Aſſ. 6. Pl. Com. 554. 19 E. 4. 10. Vid. Sect. 703. 747.

Firſt, that a lineall warrantie doth binde the right of a fee ſimple.

Secondly, that a lineall warrantie doth not binde the right of an eſtate taile, for that it is reſtrained by the ſtatute of *donis conditionalibus*.

Thirdly, that a lineall warranty and aſſets is a barre of the right in taile, and is not reſtrained (as hath beene ſaid) by the ſaid act.

Fourthly, that a collaterall warranty made by a collaterall anceſtor of the donee, doth binde the right of an eſtate taile, albeit there be no aſſets; and the reaſon thereof is upon the ſtatute of *donis conditionalibus*, for that it is not made by the tenant in taile, &c. as the lineall warrantie is.

To this may be added, that the warranty of the donee in taile, which is collaterall to the donor, or to him in remainder, being heire to him, doth binde them without any aſſets. For though the alienation of the donee after iſſue doth not barre the donor, which was the miſchiefe provided for by the act, yet the warranty being collaterall doth barre both of them; for the act reſtraineth not that warranty, but it remaineth at the common law, as *Littleton* after ſaith: and in like manner the warranty of the donee doth barre him in the remainder.

(Moor 96. accord. Vaugh. 382. contra. See Vaugh. 365.)

"*Aſſets*, (id eſt) quod tantundem valet," ſufficient by diſcent.

Fleta lib. 2. ca. 65. Britton 185. 4 E. 3. Garr. 63. 16 E. 3. Aſſ. 4. 43 E. 3. 9. 7 H. 6. 3. 11 H. 4. 20. (2 Roll. Abr. 774, 775.)

Note, aſſets requiſite to make a lineall warranty a barre muſt have ſix qualities. Firſt it muſt be aſſets (that is) of equall value or more at the time of the diſcent. Secondly, it muſt be of diſcent, and not by purchaſe or gift. Thirdly, as *Littleton* here ſaith, it muſt be aſſets in fee ſimple, and not in taile, or for another man's life. Fourthly, it muſt deſcend to him as heire to the ſame anceſtor that made the warranty, as *Littleton* alſo here ſaith. Fifthly, it muſt be of lands or tenements, or rents, or ſervices valuable, or other profits iſſuing out of lands or tenements, and not perſonall inheritances, as annuities and the like. Sixthly, it muſt be in ſtate or intereſt, and not in uſe or right of actions or rights of entry, for they are no aſſets until they be brought into poſſeſſion. [a] But if a rent in fee ſimple iſſuing out of the land of the heire deſcend unto him whereby it is extinct, yet this is aſſets, and to this purpoſe hath in judgement of law a continuance.

24 E. 3. 47. (6 Rep. 56.) [a] 31 E. 3. Aſſ. 5. 13 E. 3. Recoverie in value 17. Lib. 3. fol. 31. Butler & Baker's caſe.

[b] A ſeigniory in fee almoigne is no aſſets, becauſe it is not valuable, and therefore not to be extended; and ſo it ſeemeth of a ſeigniory of homage and fealty. But an advowſon is aſſets, whereof [c] *Fleta* ſaith; *Item de eccleſiis quæ ad donationem domini pertinent quot ſunt, et quæ, et ubi, et quantum valeat quæ liber eccleſia per*

[b] 14 E. 3. Meſne 7. Regiſtrum 293. [c] Fleta, lib. 2. cap. 65.

Britton fol. 185. Extent. manerii. 5 H. 7. 37. 32 H. 6. 21. 33 E. 3. Garr. 102.

per annum ſecundum veram ipſius æſtimationem, et pro marcâ ſolidus extendatur, ut ſi ecclęſia centum marcas valeat per annum, ad centum ſolidos extendatur advocatio per annum. (1) And herewith agreeth *Britton*, and others have reckoned a ſhilling in the pound; and *Britton* addeth further, *mes ſi la advowſon duiſt eſtre vendue, adonques ferr' le reaſonable price ſolonque le value en un an a cel extent.* Wherein it is to be obſerved, that antiquitie did ever reckon by markes.

Sect. 713.

ITEM, ſi terre ſoit done a un home et a les heires de ſon corps engendres, le quel prent feme, et ont iſſue fits enter eux, et le baron diſcontinua le taile en fee et devy, et puis la feme releſſa al diſcontinuee en fee ove garrantie, &c. et moruſt, et le garrantie diſcendiſt a le fits, ceo eſt un collateral garrantie.

ALSO, if land be given to a man, and to the heires of his bodie begotten, who taketh wife, and have iſſue a ſon betweene them, and the huſband diſcontinues the taile in fee and dieth, and after the wife releaſeth to the diſcontinuee in fee with warrantie, &c. and dieth, and the warranty deſcends to the ſon, this is a collaterall warrantie.

THIS caſe ſtandeth upon the ſame reaſon that divers other formerly put by our author doe, viz. that becauſe the heire claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warrantie of the wife is collaterall, and the warrantie made by any anceſtor male or female of the wife bindeth; and here the warrantie deſcendeth after the diſcent of the right.

Sect. 714.

[375. a.]

(9 Rep. 143. a. Ant. 187. a.)

MES ſi tenements ſoyent dones a le baron et a ſa feme, et a les heires de lour deux corps engendres, queux ont iſſue fits, et le baron diſcontinua le taile et moruſt, et puis la feme releſſa ove garrantie et moruſt, ceſt garrantie n'eſt forſque un lineal garrantie a le fits; car le fits ne ſerra barre en ceo cas de ſuer ſon breve de formedon, *ſinon que il ad aſſets per diſcent en fee ſimple per ſa mere, pur ceo que lour iſſue en briefe de* formedon *covient conveyer a luy le droit come heire a ſon pere et a ſa mere de lour * deux corps engendres per forme del*

BUT if lands be given to the huſband and wife, and to the heires of their two bodies begotten, who have iſſue a ſon, and the huſband diſcontinue the taile and dieth, and after the wife releaſe with warrantie and dieth, this warrantie is but a lineall warranty to the ſon; for the ſonne ſhall not be barred in this caſe to ſue his writ of *formedon*, unleſſe that hee hath aſſets by diſcent in fee ſimple by his mother, becauſe their iſſue in the writ of *formedon* ought to convey to him the right as heire to his father and mother

* *deux* not in L. and M. nor Roh.

(1) Bro. *Aſſets per Diſcent* 21 contra.

del done; et iſſint en tiel caſe, le garrantie de le pere et le garrantie de la mere ne ſont forſque lineal garrantie al heire, &c.

mother of their two bodies begotten *per formam doni*; and ſo in this caſe the warrantie of the father and the warrantie of the mother are but lineall warrantie to the heire, &c.

HERE is a point worthy of obſervation, that albeit in this caſe the iſſue in taile muſt claime as heire of both their bodies, yet the warrantie of either of them is lineall to the iſſue; and yet the iſſue cannot claime as heire to either of them alone, but of both. 35 E. 3. tit. Gar. 73. (2 Roll. Abr. 741. Ant. 187. a. Sect. 25.)

If lands be given to a man and to a woman unmarried, and the heires of their two bodies, and they intermarrie, and are diſſeiſed, and the huſband releaſe with warrantie, the wife dieth, the huſband dieth, albeit the donees did take by moities, yet the warrantie is lineall for the whole, becauſe, as our author here ſaith, the iſſue muſt in a *formedon* convey to him the right as heire to his father and his mother of their two bodies engendred; and therefore it is collaterall for no part.

Sect. 715.

ET nota, que en cheſcun cas ou home demanda tenements en fee taile per brieſe de formedon, *ſi aſcun del iſſue en le taile que avoit poſſeſſion, ou que n'avoit aſcun poſſeſſion, fait un garrantie, &c. ſi celuy que ſuiſt le brieſe de* formedon *puiſſoit per aſcun poſſibilitie, per matter que puiſſoit eſtre en fait, conveyer a luy, per my celuy que fiſt legarrantie* [375. b.] *performe del done, * ceo eſt un lineal garrantie, et nemy collateral.*

AND note, that in everie caſe where a man demandeth lands in fee taile by writ of *formedon*, if any of the iſſue in taile that hath poſſeſſion, or that hath not poſſeſſion, make a warrantie, &c. if hee which ſueth the writ of *formedon* might by any poſſibilitie, by matter which might be *en fait*, convey to him, by him that made the warrantie *per formam doni*, this is a lineall warrantie, and not collaterall.

OF this ſufficient hath beene ſaid before, *ſed nunquàm nimis dicitur quod nunquàm ſatis dicitur*; for it is a point of great uſe and conſequence. 35 E. 3. Gar. 73.

Sect. 716.

(Vaugh. 377.) (8 Rep. 51.) (Vaugh. 367. 377.)

ITEM, ſi home ad iſſue trois fits, et il dona terre al eigne fits, a aver et tener a luy et a les heires de ſon corps engendres, et pur default de tiel iſſue, le remainder al mulnes fits, a luy et a les heires de ſon corps engendres, et pur default de tiel iſſue † del mulnes, le

ALSO, if a man hath iſſue three ſonnes, and giveth land to the eldeſt ſonne, to have and to hold to him and to the heires of his bodie begotten, and for default of ſuch iſſue, the remainder to the middle ſonne, to him and to the heires of his

* *&c.* added L. and M. and Roh. † *del mulnes* not in L. and M. nor Roh.

le remainder al puiſne ſits, et les heires de ſon corps engendres; en ceſt cas, ſi l'eigne ‡ diſcontinua le taile en fee, et oblige luy et ſes heyres a garrantie, et moruſt ſans iſſue, ceo eſt un collateral garrantie al mulnes ſits, et ſerra barre a demaunder meſme la terre per force del remainder; pur ceo que le remainder eſt ſon title, et ſon eigne frere eſt collateral a cel title, que commence per force del remainder. En meſme le maner eſt, ſi le mulnes ſits avoit meſme la terre per force del remainder, pur ceo que ſon eigne frere ne fiſt aſcun diſcontinuance, mes moruſt ſans iſſue de ſon corps, et puis le mulnes fait un diſcontinuance ove garrantie, &c. et moruſt ſans iſſue, ceo eſt un collateral garrantie a le puiſne ſits. Et auxy en ceſt caſe, ſi aſcun de les dits ſits ſoit diſſeiſie, et le pere que fiſt le done, &c. releſſa a le diſſeiſor tout ſon droit § ove garrantie, ¶ ceo eſt un collateral garrantie a celuy ſits ſur que le garrantie diſcendiſt, cauſâ quâ ſupra.

his bodie begotten, and for default of ſuch iſſue of the middle ſonne, the remainder to the youngeſt ſon, and to the heires of his bodie begotten; in this caſe, if the eldeſt diſcontinue the taile in fee, and binde him and his heires to warrantie, and dieth without iſſue, this is a collaterall warrantie to the middle ſon, and ſhall be a bar to demand the ſame land by force of the remainder; for that the remainder is his title, and his elder brother is collaterall to this title, which commenceth by force of the remainder. In the ſame manner it is, if the middle ſon hath the ſame land by force of the remainder, becauſe his eldeſt brother made no diſcontinuance, but died without iſſue of his bodie, and after the middle make a diſcontinuance with warrantie, &c. and dieth without iſſue, this is a collaterall warrantie to the youngeſt ſon. And alſo in this caſe, if any of the ſaid ſonnes be diſſeiſed, and the father that made the gift, &c. releaſeth to the diſſeiſor all his right with warrantie, this is a collaterall warrantie to that ſon upon whom the warrantie deſcendeth, *cauſâ quâ ſupra.*

Sect. 717. [376. a]

ET ſic nota, *que lou home que eſt collateral a le title, + et ceo releaſe ove garrantie, &c. ceo eſt un collateral garrantie.*

AND ſo note, that where a man that is collaterall to the title, and releaſeth this with warrantie, &c. this is a collaterall warrantie.

8 R. 2. Garr. 101. Vi. Sect. 701.

HERE it appeareth that it is not adjudged in law a collaterall warrantie in reſpect of the bloud, for the warrantie may be collaterall, albeit the bloud be lineall; and the warrantie may be lineall, albeit the bloud be collaterall, as hath beene ſaid. But it is in law deemed a collaterall warrantie, in reſpect that he that maketh the warrantie is collaterall to the title of him upon whom the warrantie doth fall; as by the example which *Littleton* here putteth, and by that which hath beene formerly ſaid, is manifeſt.

‡ *fits* added L. and M. and Roh.
§ &c. added L. and M. and Roh.
¶ &c. added L. and M. and Roh.
+ &c. added L. and M. and Roh.

Sect. 718.

ITEM, ſi pier dona terre a ſon eigne fits, a aver et tener a luy et a les heires males de ſon corps engendres, le remainder a le ſecond fits, &c. ſi l'eigne fits alienaſt en fee oveſque garrantie, &c. et ad iſſue female, et moruſt ſans iſſue male, ceo n'eſt pas collaterall garrantie al ſecond fits, † car il ne ſerra barre de ſon action de formedon *en le remainder, pur ceo que le garrantie diſcendiſt al file del eigne fits, et nemy al ſecond fits: car cheſcun garrantie que diſcendiſt, diſcendiſt a celuy que eſt heire a luy que fiſt le garrantie, per le common ley.*

ALSO, if a father giveth land to his eldeſt ſon, to have and to hold to him and to the heires males of his body begotten, the remainder to the ſecond ſonne, &c. if the eldeſt ſonne alieneth in fee with warranty, &c. and hath iſſue female, and dieth without iſſue male, this is no collaterall warranty to the ſecond ſon, for he ſhall not bee barred of his action of *formedon* in the remainder, becauſe the warranty deſcended to the daughter of the elder ſon, and not to the ſecond ſonne: for every warrantie which deſcends, deſcendeth to him that is heire to him who made the warrantie, by the common law.

HERE is rehearſed a maxime of the common law, that every warrantie doth deſcend upon him that is heire to him that made the warrantie, by the common law, as by this example it appeareth. Vid. Sect. 3. 603. 735, 736, 737. (Ant. 329. a. Cro. Eliz. 72.)

"*A celuy que eſt heire a luy que fiſt le garrantie per le common* "*ley, &c.*" Hereupon many things worthy to be knowne are to be underſtood.

[a] Firſt, that if a man infeoffeth another of an acre of ground with warrantie, and hath iſſue two ſons, and dieth ſeiſed of another acre of land, of the nature of burrough Engliſh, the feoffee is impleaded, albeit the warrantie deſcendeth onely upon the eldeſt ſonne, yet may he vouch them both; the one as heire to the warrantie, and the other as heire to the land: for if he ſhould vouch the eldeſt ſon only, then ſhould he not have the fruit of his warranty, viz. a recoverie in value; the youngeſt ſon only he cannot vouch, becauſe he is not heire at the common law, upon whom the warrantie deſcendeth. (1) [a] 40 E. 3. 14. (Mod. Rep. 96. 2 Cro. 218.

[b] So it is of heires in gavelkind, the eldeſt may bee vouched as heire to the warranty, and the other ſonnes in reſpect of the inheritance deſcended unto them. [c] And in like ſort, the heire at the common law, and the heire of the part of the mother, ſhall bee vouched: but the heire at the common law may be vouched alone in both theſe caſes, at the election of the tenant: *et ſic de ſimilibus.* [d] In the ſame manner if a man dieth ſeiſed of certaine lands in fee, having iſſue a ſonne and a daughter by one venter, and a ſonne by another, the eldeſt ſonne entreth and dieth, the land deſcends [b] 22 E. 4. 10. 4 E. 3. 55. 27 H. 6. 1, 2. 11 E. 3. Det. 7. (8 Rep. 8. b.) [c] 49 Aſſ. 4. 38 E. 3. 22. (Hob. 25.) [d] 32 E. 3. Vouch. 94. 35 H. 6. 33.

[376. b.]

† *car il ne ſerra barre—ne luy ledera,* L. and M. and Roh.

(1) 38 E. 3. 22. 43 E. 3. 19. 48 Aſſ. 41. 4 E. 3. 55. 21 E. 3. 46. 21 E. 3. 36 11 H. 7. 12. 6 H. 7. 2. Hale's MSS.

deſcends to the ſiſter; in this caſe the warrantie deſcendeth on the ſonne, and he may be vouched as heire, and the ſiſter, as heire of the land: in which and the other caſe of burrough Engliſh, the ſonne and heire by the common law having nothing by diſcent, the whole loſſe of the recoverie in value lieth upon the heires of the land, albeit they be no heires to the warrantie. Then put the caſe that

Pl. Com. 515. there is a warrantie paramount, Who ſhall deraigne that warrantie? and to whom ſhall the recompence in value goe? Some have ſaid, that as they are vouched together, ſo ſhall they avouch over, and that the recompence in value ſhall enure according to the loſſe; and that the effect muſt purſue the cauſe, as a recoverie in value by a warrantie of the part of the mother ſhall goe to the heire of the part of the mother, &c.

(2 Cro. 218.) Some others hold, that it is againſt the maxime of law, that they that are not heires to the warrantie ſhould joyne in voucher, or to take benefit of the warrantie which deſcended not to them; but that the heire at the common law, to whom the warrantie deſcended, ſhall deraigne the warrantie, and recover in value; and that this doth ſtand with the rule of the common law.

Others hold the contrarie, and that this ſhould be both againſt the rule of law, and againſt reaſon alſo; for by the rule of law [e] the vouchee ſhall never ſue to have execution in value, untill execution be ſued againſt him. But in this caſe execution can never be ſued againſt the heire at the common law, therefore he cannot ſue to have execution over in value. Secondly, it ſhould be againſt reaſon that the heire at the common law ſhould have *totum lucrum*, and the ſpeciall heires *totum damnum*. I finde in our bookes [f] that this reaſon is yeelded, that the ſpeciall heire ſhould not be vouched only; for (ſay they) if the ſpeciall heires ſhould be vouched only, then could not they deraigne the warrantie over; which ſhould be miſchievous, that they ſhould loſe the benefit of the warrantie, if they ſhould be vouched only. But if the heire at the common law were vouched with them, (as by the law he ought) all might be ſaved; and therefore ſtudie well this point how it may be done.

[e] 17 E. 2. tit. Recoverie in value 33. 1 E. 3. 12. 33 E. 3. Judgm. 222. 14 E. 3. ib. 160. 10 E. 3. 52. 18 E. 3. 51. Lib. 1. fol. 96. Shelleye's caſe.

[f] 32 E. 3. Vouch. 94. per Greene. (Plowd. 11. a. Manxel's caſe.)

[g] If tenant in generall taile be, and a common recoverie is had againſt him and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, tenant in taile dieth, and the wife ſurviveth; for that the iſſue in taile had the whole loſſe, the recompence ſhall enure wholly to him; and the wife, albeit ſhe was partie to the judgement, ſhall have nothing in the recompence, for that ſhe loſeth nothing.

[g] Vide Pl. Com. fol. 514. (3 Rep. 5. 10 Rep. 35. Dr. and Stud. 41. b. 8 Rep. 101. b. See Cro. Eliz. 670.)

[h] If the baſtard eigne enter and take the profits, he ſhall be vouched only, and not the baſtard and the mulier; becauſe the baſtard is in appearance heire, and ſhall not diſable himſelfe.

[h] 17 E. 3. 59. 20 E. 3. Vouch. 199. 32 E. 3. Vouch. 94. 5 H. 7. 2.

[i] If a man be ſeiſed of lands in gavelkinde, and hath iſſue three ſonnes, and by obligation bindeth himſelfe and his heires and dieth, an action of debt ſhall be maintainable againſt all the three ſonnes, for the heire is not chargeable unleſſe he hath lands by diſcent.

[i] 11 H. 7. 12. 11 E. 3. tit. Det. 7. Dy. 5 El. 238. (Moor 74.)

[k] So if a man be ſeiſed of land on the part of his mother, and binde himſelfe and his heires by obligation, and dieth, an action of debt ſhall lie againſt the heire on the part of the mother, without naming of the heire at the common law. And ſo note a

[k] 11 H. 7. 12. (2 Cro. 25. b. 218. 1 Siderf.

diverſitie

diverſitie betweene a perſonall lien of a bond, and a reall lien of a warrantie. 238. 272. 420. Hob. 25.)

Sect. 719.

* *NOTA, ſi terre ſoit done a un home, et a les heires males de ſon corps engendres, et pur default de tiel iſſue, le remainder ent a ſes heires females de ſon corps engendres, et puis le donee en le taile fait feoffment en fee oveſque garrantie accordant, et ad iſſue fits et file et moruſt, cel garrantie n'eſt forſque lineal garrantie a le fits a demaunder per briefe de* formedon en le diſcender; *et auxy il n'eſt forſque lineall a le file, a demaunder meſme la terre per briefe de* formedon en le remainder, *ſinon* †*frere deviaſt ſans iſſue male, pur ceo que el claime come heire female de la corps ſon pere engendres. Mes en ceſt cas, ſi ſon frere en ſa vie releaſaſt al diſcontinuee, &c. ove garrantie, &c. et puis moruſt ſauns iſſue, ceo eſt un collateral garrantie a le file, pur ceo que el ne poit conveyer a luy le droit que el ad per force de le remaynder per aſcun meane de diſcent per ſon frere,* †*pur ceo* ‡ *que le frere eſt collateral a le title ſa ſoer, et pur ceo ſon garrantie eſt collateral, &c.*

NOTE, if land bee given to a man, and to the heirs males of his bodie begotten, and for default of ſuch iſſue, the remainder thereof to his heires females of his body begotten, and after the donee in tayle maketh a feoffement in fee with warrantie accordingly, and hath iſſue a ſon and a daughter and dieth, this warrantie is but a lineall warrantie to the ſonne to demand by a writ of *formedon* in the diſcender; and alſo it is but lineall to the daughter, to demand the ſame land by writ of *formedon* in the remaynder, *unleſſe the* brother dieth without iſſue male, becauſe ſhee claymeth as heire female of the bodie of her father ingendred. But in this caſe, if her brother in his life releaſe to the diſcontinuee, &c. with warrantie, &c. and after dieth without iſſue, this is a collaterall warranty to the daughter, becauſe ſhee cannot convey to her the right which ſhee hath by force of the remainder by any meanes of diſcent by her brother, for that the brother is collaterall to the title of his ſiſter, and therefore his warranty is collaterall, &c.

HERE it appeareth, that [*l*] whenſoever the anceſtor taketh any eſtate of freehold, a limitation after in the ſame conveyance to any of his heires, are words of limitation, and not of purchaſe, albeit in words it be limited by way of remainder; (1) and therefore here the remainder, to the heires females, veſteth in the [377. a.] tenant in taile himſelfe. And it is good to bee knowne, that for learning ſake, and to find out the reaſon of the law, theſe limitations

[*l*] 24 E. 3. 36. 27 E. 3. age 106. 38 E. 3. 26. 40 E. 3. 9. 37 H. 8. Br. Noſme 1 & 40. & tit. Done & Rem. 61. (Ant. 17. b. 22. b. 2 Roll. Abr. 417.

* *Nota—Item*, L. and M. and Roh.

† *ſinon—ſi ſon*, L. and M. Roh. Pinſon, Redman, and MSS. This reading, which materially alters the ſenſe of the above paſſage of Littleton, was much relied on by lord Vaughan as above cited, and is alſo accordingly confirmed by edit. 1577, by R. Tottel; 1594, by C. Yetſweirt; and by that of 1639. It is however obſervable, that the text ſtood as above in the firſt edition of Coke upon Littleton 1628, and in all the editions to the 9th inclusive.

‡ *et* added L. and M. and Roh.

‡ *que* not in L. and M. nor Roh.

(1) [See Note 329.]

limitations to the heires males of the bodie, and after to the heires females of the bodie may be put: but it is dangerous to uſe them in conveyances, for great inconveniences may ariſe therupon; for if ſuch a tenant in tayle hath iſſue divers ſons, and they have iſſue divers daughters, and likewiſe if tenant in tayle hath iſſue divers daughters, and each of them hath iſſue ſonnes, none of the daughters of the ſons, nor the ſonnes of the daughters, ſhall ever inherite to either of the ſaid eſtates tayle: and ſo it is of the iſſues of the iſſues, for that (as hath beene ſaid) the iſſues inheritable muſt make their clayme eyther onely by males, or onely by females; ſo as the females of the males, or males of the females, are wholly excluded to bee inheritable to eyther of the ſaid eſtates tayle: but where the firſt limitation is to the heires males, let the limitation be, for default of ſuch iſſue, to the heires of the bodie of the dames, and then all the iſſues, be they females of males, or males of females, are inheritable.

2 Roll. Abr. 627, 628.) 1 H. 6. 4. 11 H. 6. 13, 14. 28 H. 6. Deviſ. 18. Statham. Deviſe Pl. Com. 414. 20 H. 6. 43. Vid. Litt. ca. Taile, Sect. 24. 37 H. 8. Br. done & rem. 61. & tit. noſme 1. & 40. (Ant. 25. a. b.) (Vaugh. 368. g. 376. Ant. 374. a.)

If a man give lands to a man, to have and to hold to him and the heires males of his bodie, and to him and to the heires females of his bodie, the eſtate to the heires females is in remaynder, and the daughters ſhall not inherite any part, ſo long as there is iſſue male; for the eſtate to the heires males is firſt limited, and ſhall be firſt ſerved; and it is as much to ſay, and after to the heires females, and males in conſtruction of law are to be preferred.

Sect. 720.

[377. b.]

(9 Rep. 127.) (Plowd. 403. a.)

ITEM, jeo ay oye dire, que en temps le roy Richard *le ſecond, il y fuit un juſtice del common banke demaurant en* Kent, *appel* Richel, *que avoit iſſue divers fits, et ſon entent fuit, que ſon eigne fits averoit certaine terres et tenements a luy, et a les heires de ſon corps engendres; et pur default d'iſſue, le remaindex a le ſecond fits, &c. et iſſint a le tierce fits, &c. et pur ceo que il voile que nul de ſes fits alieneroit, ou ſerroit garrantie pur barrer ou leder les auters queux ſerront en le remainder, &c. il fiſt faire tiel indenture a tiel effect, c'eſt aſcavoir, que les terres et tenements ſueront dones a ſon eigne fits ſur tiel condition, que ſi l'eigne fits aliena en fee, ou en fee taile, &c. ou ſi aſcun de ſes fits alienaſt, &c. que adonque lour eſtate ceſſera et ſerroit void, et que adonque meſmes les terres et tenements immediate remaindront a le ſecond fits, et a les heires de ſon corps engendres,*

ALSO, I have heard ſay, that in the time of king *Richard* the ſecond, there was a juſtice of the common place, dwelling in *Kent*, called *Richel*, who had iſſue divers ſonnes, and his intent was, that his eldeſt ſonne ſhould have certaine lands and tenements to him, and to the heires of his bodie begotten; and for default of iſſue, the remainder to the ſecond ſonne, &c. and ſo to the third ſonne, &c. and becauſe he would that none of his ſons ſhould alien, or make warrantie to bar or hurt the others that ſhould be in the remainder, &c. he cauſeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldeſt ſon upon ſuch condition, that if the eldeſt ſon alien in fee, or in fee taile, &c. or if any of his ſons alien, &c. that then their eſtate ſhould ceaſe and be void, and that then the ſame lands

dres, * et ſic ultra, *le remainder as auters de ſes fits, et livery de ſeiſin fuit fait accordant.*

lands and tenements immediately ſhould remain to the ſecond ſon, and to the heires of his body begotten, *et ſic ultra,* the remainder to his other ſonnes, and livery of ſeiſin was made accordingly.

"*JEO oy oye dire, &c.*" Thoſe things that one hath by credible hearſay, by the example of our author, are worthy of obſervation. This invention, deviſed by juſtice *Rickel* in the reigne of king *Richard* the ſecond, who was an Iriſhman borne, and the like by *Thirning*, chiefe-juſtice in the reigne of *Henry* the fourth, were both full of imperfections; for *Nihil ſimul inventum eſt et perfectum,* and *Sæpe viatorem nova non vetus orbita fallit:* and therefore new inventions in aſſurances are dangerous. And hereby it may appeare, that it is not ſafe for any man (be he never ſo learned) to be of counſell with himſelfe in his owne caſe, but to take advice of other great and learned men. 21 H. 6. f. 33. L. 6. f. 42. b. ſir Anthony Mildmaye's caſe. (1 Rep. 84.)

Non proſunt dominis quæ proſunt omnibus, artes.

And the reaſon hereof is, *in ſuo quiſque negotio hebetior eſt, quàm in aliena.*

[*m*] And the ſame judge, in his owne name, &c. brought an action upon his caſe againſt others, and obtained a verdict ſo as the right of the cauſe was tried on his ſide; yet for that upon his owne ſhewing in his count the action did not lye, *ex aſſenſu omnium juſticiariorum præter querentem Rickel,* judgement was given againſt him: but let us now leave this judge for example to others, and let us return to our author. [*m*] 2 H. 4. f. 11. in Action ſur le caſe.

[378. a.] Sect. 721.

MES il ſemble per reaſon, que touts tielx remainders en la forme avantdit ſont voides et de nul value, et ceo pur trois cauſes. Un cauſe eſt, pur ceo que cheſcun remainder que commence per un fait, il covient que le remainder ſoit en luy a que le remainder eſt tayle per force de meſme le fait, avant liverie de ſeiſin eſt fait a luy que avera le franktenement; car en tiel caſe le neſſance et le eſtre de le remainder eſt per le livery de ſeiſin a celuy que avera le franktenement, et tiel remainder ne fuit al ſecond fits al temps de livery de ſeiſin en le cas avantdit, &c.

BUT it ſeemeth by reaſon, that all ſuch remainders in the forme aforeſaid are void and of no value, and that for three cauſes. One cauſe is, for that every remainder which beginneth by a deed, it behooveth that the remainder be in him to whom the remainder is entailed by force of the ſame deed, before the livery of ſeiſin is made to him which ſhal have the freehold; for in ſuch caſe the growing and the being of the remainder is by the livery of ſeiſin to him that ſhall have the freehold, and ſuch remainder was not to the ſecond ſonne at the time of the livery of ſeiſin in the caſe aforeſaid, &c.

HERE

* *ceo ſur meſme condition, ſcilicet, que ſi le ſecond fits aliena ſa, &c. que adonques ſon eſtate ceſſera, et que adonques meſmes les terres et tenements remaindront al tierce fits, et a les heires de ſon corps engendres,* added L. and M. and Roh.

HERE our authour is of opinion, that theſe remainders in the forme aforeſaid, are void and of no value for three cauſes.

(Plowd. 25. a. 29. a. 2 Cro. 360.)

"*Un cauſe eſt, &c.*" Here hee ſetteth downe a rule concerning remainders, viz. every remainder which commenceth by a deed ought to veſt in him to whom it is limited, when livery of ſeiſin is made to him that hath the particular eſtate.

[n] 7 R. 2. Scire facias. (Ant. 354. b.)

Firſt, *Littleton* ſaith by deed, [n] becauſe if lands bee granted and rendred by fine for life, the remainder in taile, the remainder in fee, none of theſe remainders are in them in the remainder, untill the particular eſtate be executed.

(Cro. Eliz. 360.)

Secondly, that the remainder bee in him, &c. at the time of the livery. This is regularly true, but yet it hath divers exceptions.

(2 Roll. Abr. 419.)

Firſt, unleſſe the perſon that is to take the remainder be not *in rerum naturâ*; [o] as if a leaſe for life be made, the remainder to the right heires of *I. S. I. S.* being then alive, it ſufficeth that the inheritance paſſeth preſently out of the leſſour, but cannot veſt in the heire of *I. S.* for that living his father he is not *in rerum naturâ*, for *non eſt hæres viventis*; ſo as the remainder is good upon this contingent, viz. if *I. S.* die during the life of the leſſee.

[o] 32 H. 6. tit. Feoffments & Faits, 99. 27 E. 3. 87. 11 R. 2. Detinue, 46. 2 H. 7. 13. 12 H. 7. 27. 12 E. 4. 2. 21 H. 7. 11. 7 H. 4. 23. 11 H. 4. 74. 18 H. 6. 8. 27 H. 8. 42. 38 E. 3. 26. 30 Aſſ. 47. 6 R. 2. qu. Jur. clam. 20. (1 Rep. 94.)

[p] Pl. Com. Colthirſt's caſe, fol. 25. 29. (3 Rep. 20. 2 Rep. 57. a. b.)

[p] And ſo it is if a man make a leaſe for life to *A. B.* and *C.* and if *B.* ſurvive *C.* then the remainder to *B.* and his heires. Here is another exception out of the ſaid rule; for albeit the perſon be certaine, yet inaſmuch as it depends upon the dying of *B.* before *C.* the remainder cannot veſt in *C.* preſently. And the reaſon of both theſe caſes in effect is, becauſe the remainder is to commence upon limitation of time, viz. upon the poſſibilitie of the death of one man before another, which is a common poſſibilitie.

(6 Rep. 73.)

A man letteth lands for life upon condition to have fee, and warranteth the land *in formâ prædictâ*, afterward the leſſee performeth the condition whereby the leſſee hath fee, the warranty ſhall extend and increaſe according to the ſtate. And ſo it is in that caſe if the leſſor had died before the performance of the condition, the warrantie ſhall riſe and increaſe according to the eſtate, and yet the leſſor himſelfe was never bound to the warrantie, but it hath relation from the firſt livery. And by this it appeareth that a warranty being a covenant reall executory, may extend to an eſtate *in futuro*, having an eſtate, whereupon it may worke in the beginning. But if a man grant a ſeigniorie for yeares, upon condition to have fee with a warranty *in formâ prædictâ*, and after the condition is performed, this ſhall not [378. b.] extend to the fee, becauſe the firſt eſtate was but for yeares, which was not capable of a warranty. And ſo it is, if a man make a leaſe for yeares, the remainder in fee, and warrant the land *in formâ prædictâ*, he in the remainder cannot take benefit of the warranty, becauſe he is not partie to the deed; and immediately he cannot take, if he were partie to the deed, becauſe he is named after the *habendum*, and the eſtate for yeares is not capable of a warrantie. And ſo it is if land be given to *A.* and *B.* ſo long as they joyntly together live, the remainder to the right heires of him that dieth firſt, and warrant the land *in formâ prædictâ*; *A.* dieth, his heire ſhall have the warrantie; and yet the remainder veſted not during the life of *A.* for

(Hob. 130, 131.)

(1 Rep. 17.)

A. for the death of *A.* muſt precede the remainder, and yet ſhall the heire of *A.* have the land by diſcent.

Sect. 722.

*LE ſecond cauſe eſt, ſi le primer fits alienaſt les tenements en fee, adonques eſt le franktenement et le fee ſimple en l'alienee, et en nul auter; et ſi le donour avoit aſcun reverſion, per tiel alienation le reperſion eſt diſcontinue: donques coment per aſcun reaſon poit * ceo eſtre que tiel remainder commencera ſon eſtre et ſon neſſance immediate apres tiel alienation fait a un eſtrange, que ad per meſme l'alienation franktenement et fee ſimple, &c.? Et auxy ſi tiel remainder ſerroit bone, adonques purroit il enter ſur l'alienee, lou il n'avoit aſcun maner de droit avant l'alienation, que ſerra inconvenient.*

THE ſecond cauſe is, if the firſt ſonne alien the tenements in fee, then is the freehold and the fee ſimple in the alienee, and in none other; and if the donor had any reverſion, by ſuch alienation the reverſion is diſcontinued: then how by any reaſon may it be, that ſuch remainder ſhall commence his being and his growing immediately after ſuch alienation made to a ſtranger, that hath by the ſame alienation a freehold and fee ſimple, &c.? And alſo if ſuch remainder ſhould bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which ſhould bee inconvenient.

"*SI le primer fits alienaſt, &c.*" By the alienation of the donee two things are wrought.

First, the franktenement and fee is in the alienee.

Secondly, the reverſion is deveſted out of the donor. [*q*] And therefore by the alienation that transferreth the freehold and fee ſimple to the alienee, there can no remainder be raiſed and veſted in the ſecond ſonne. [*r*] As if a man make a leaſe for life upon condition that if the leſſor grant over the reverſion, that then the leſſee ſhall have fee; if the leſſor grant the reverſion by fine, the leſſee ſhall not have fee; for when the fine transferreth the fee to the conuſee, it ſhould be abſurd, and repugnant to reaſon, that the ſame fine ſhould worke an eſtate in the leſſee; for one alienation cannot veſt an eſtate of one and the ſame land to two ſeverall perſons at one time.

[*q*] 21 H. 7. 11. 27 H. 8. 24.

[*r*] 6 R. 2. quid juris clam. 20. (Perk. Sect. 729. fol. 275, 276. Dyer 299. a. Plowd. 487.) Argumentum ex abſurdo. (5 Rep. 8. a.)

In a man's owne grant, which is ever taken moſt forcibly againſt himſelfe, the reaſon of *Littleton* doth hold; for it hath beene reſolved by the juſtices, [*s*] that if a man ſeiſed of an advowſon in fee by his deed granteth the next preſentation to *A.* and before the church becommeth void, by another deed grant the next preſentation of the ſame church to *B.* the ſecond grant is void, for *A.* had the ſame granted to him before; and the grantee ſhall not have the ſecond avoydance by conſtruction, to have the next avoydance which the grantor might lawfully grant, for the grant of the next avoydance

[*s*] 20 H. 8. Preſentments al Egliſes. Br. 52. 33 H. 8. ib. 55. 29 H. 8. Dier 35. 11 Eliz. 282, 283. (5 Rep. 56.)

* *ceo* not in L. and M. nor Roh.

avoydance doth not import the second presentation. [t] But if a man seised of an advowson in fee take wife; now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heire shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation, which he might lawfully grant: and so note a diversitie betweene a title by act in law and by act of the partie; for the act in law shall worke no prejudice to the grantee.

[379. a.]

[t] 15 H. 7. 7. 19 E. 3. quar. imp. 154. (3 Cro. 790, 791.) (2 Cro. 691. contra Winch 94. a. c. Hob. 120. Ant. 189. a.)

(Ant. 214. b. 218. a.)

"*Auxi si tiel remainder serroit bone, &c.*" The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entrie; then if this remainder should be good, then must it give an entrie upon the alienee to him that had no right before, which should be against the expresse rule of law, viz. that an entrie cannot be given to a stranger to avoid a voydable act, as before hath beene said in the Chapter of Conditions.

Vide Sect. 87, &c.

"*Lequel serra enconvenient.*" Here note three things. First, that whatsoever is against the rule of law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against law, as often hath beene observed. Thirdly, that new inventions (though of a learned judge in his owne profession) are full of inconvenience, *Periculosum est res novas et inusitatas inducere.*

Eventus varios res nova semper habet.

Sect. 723.

LA tierce cause est, quant la condition est tiel, que si l'eigne fits alienast, &c. que son estate cessera ou serroit void, &c. donques apres tiel alienation, &c. poit le donor enter per force de tiel condition, † coment il semble; et issint le donor ou ses heires en tiel case doient pluis tost aver la terre que le second fits, que n'avoit ascun droit devant tiel alienation; et issint il semble que tielx remainders en le cas avandit sont voides. ‡

THE third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth; and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void.

(1 Rep. 48. 62. 120. 10 Rep. 35. 9 Rep. 127. 6 Rep. 40. 2 Rep. 50. Ant. 224. a.)

HERE it is to bee observed, that part of the condition that prohibiteth the alienation made by tenant in taile is good in law, with such distinction as hath beene before said in the Chapter of

† &c. added L. and M. and Roh. ‡ &c. added L. and M. and Roh.

of Conditions. And the conſequent of the condition, viz. that the lands ſhould remaine to another, &c. is void in law, and by the opinion of *Littleton* the donor may re-enter for the condition broken; *for Utile per inutile non vitiatur:* which being in caſe of a condition for the defeating of an eſtate, is worthy of obſervation. (1 Roll. Abr. 408.)

And it is to bee noted, that after the death of the donor, the condition deſcendeth to the eldeſt ſonne, and conſequently his alienation doth extinguiſh the ſame for ever; wherein the weakneſſe of this invention appeareth: and therefore *Littleton* here ſaith, that it ſeemeth that the donor may re-enter, and ſpeaketh nothing of his heires. A man hath iſſue two ſonnes, and maketh a gift in taile to the eldeſt, the remainder in fee to the puiſne, upon condition, that the eldeſt ſhall not make any diſcontinuance with warrantie to barre him in the remainder; and if he doth, that then the puiſne ſonne and his heires ſhall re-enter, the eldeſt make a feoffment in fee with warrantie, the father dieth, the eldeſt ſonne dieth without iſſue, the puiſne may enter; but if the diſcontinuance had beene after the death of the father, the puiſne could not have entred. In this caſe foure points are to be obſerved. Firſt, as *Littleton* here ſaith, the entrie for the breach of the condition is (10 Rep. 40. b.)

[379. b.] given to the father, and not to the puiſne ſonne. Secondly, that by the death of the father the condition deſcends to the elder ſonne, and is but ſuſpended, and is revived by the death of the eldeſt ſonne without iſſue, and deſcendeth to the youngeſt ſonne. (10 Rep. 109.) 41 E. 3. fol.

Thirdly, that the feoffment made in the life of the father cannot give away a condition that is collaterall, as it may doe a right. Vid. Sect. 446.

Fourthly, that a warrantie cannot binde a title of entrie for a condition broken (as hath beene ſaid); but if the diſcontinuance had beene made after the death of the father, it had extinct the condition: which caſe is put to open the reaſon of our author's opinion. (1) (10 Rep. 95.)

In theſe laſt three Sections our author hath taught us an excellent point of learning, that when any innovation or new invention ſtarts up, to trie it with the rules of the common law (as our author here hath done); for theſe be true touchſtones to ſever the pure gold from the droſſe and ſophiſtications of novelties and new inventions. And by this example you may perceive, that the rule of the old common law being ſoundly (as our author hath done) applyed to ſuch novelties, it doth utterly cruſh them and bring them to nothing; and commonly a new invention doth offend againſt many rules and reaſons (as here it appeareth) of the common law; and the antient judges and ſages of the law have ever (as it appeareth [*] in our bookes) ſuppreſſed innovations and novelties in the beginning, as ſoone as they have offered to creepe up, leſt the quiet of the common law might be diſturbed: and ſo have [a] acts of parliament done the like, whereof by the authorities quoted in the margent, you may in ſtead of many others, upon this occaſion take a little taſte. But our excellent author, in all his three bookes, hath ſaid nothing but *Ex veterum ſapientium ore et more.* (Plowd. 413. Aut. 282. b.)

[*] 31 E. 3. Gager deliverance 5. 23 Aſſ. 12. 38 E. 3. 1. 2 H. 4. 18, &c.

[a] 1 E. 3. cap. 15. ſtat. 3. 18 E. 3. cap. 1 & 6. 4 H. 4. ca. 2. 11 H. 6. c. 23. 2 E. 4. cap. 8, &c.

(1) [See Note 330.]

Sect. 724.

(2 Inſt. 293. cap. 3.)

ITEM, a le common ley, devant l'eſtatute de Glouceſter, *ſi tenant per le curteſie uſt alien en fee oveſque garrantie,* * *apres ſon deceaſe ceo fuit un barre al heire,* † *ſicome appiert per les parols de meſme l'eſtatute: mes il eſt remedy per meſme l'eſtatute, que le garrantie de le tenant per le curteſie ne ſerroit my bar al heire, ſinon que il y ad aſſets per diſcent per le tenant per le curteſie; car devant le dit eſtatute, ceo fuit un collateral garrantie al heire, pur ceo que il ne puiſſoit conveyer aſcun title de diſcent a les tenements per le tenant per le curteſie, mes tantſolement per ſa mere, ou auters de ſes anceſtors* ‡; *et ceo eſt le cauſe pur que il fuit collateral garrantie.*

ALSO, at the common law, before the ſtatute of *Glouceſter*, if tenant by the curteſie had aliened in fee with warrantie, after his deceaſe this was a barre to the heire, as it appeareth by the words of the ſame ſtatute: but it is remedied by the ſame ſtatute, that the warrantie of tenant by the curteſie ſhall bee no barre to the heire, unleſſe that hee hath aſſets by diſcent by the tenant by the curteſie; for before the ſayd ſtatute, this was a collateral warrantie to the heire, for that hee could not convey any title of diſcent to the tenements by the tenant by the curteſie, but only by his mother, or other of his anceſtors; and this is the cauſe why it was a collateral warrantie.

Sect. 725.

MES ſi home inheritor prent feme, les queux ont § *fits enter eux, et le pier devie, et le fits entra en la terre, et endowa ſa mere, et puis le mere alien ceo que el ad en ſa dower, a un auter en fee ove garrantie accordant, et puis moruſt, et le garrantie diſcendiſt a le fits, ore le fits ſerra barre a demaunder meſme la terre per cauſe de la dit garrantie; pur ceo que tiel collateral garrantie de tenaunt en dower n'eſt pas remedie per aſcun eſtatute. Meſme la ley eſt, lou tenaunt a terme de vie fait un alienation oveſque garrantie, &c. et moruſt, et le garrantie diſcendiſt a celuy que avoit le reverſion ou le remainder,* ‖ *ils ſerront barres per tiel garrantie* ‡.

BUT if a man inheritor taketh wife, who have iſſue a ſonne betweene them, and the father dieth, and the ſonne entreth [380. a] into the land, and endow his mother, and after the mother alieneth that which ſhee hath in dower, to another in fee with warrantie accordant, and after dieth, and the warrantie deſcendeth to the ſonne, now the ſon ſhall be barred to demand the ſame land by cauſe of the ſayd warrantie; becauſe that ſuch collaterall warrantie of tenaunt in dower is not remedied by any ſtatute. The ſame law is it, where tenant for life maketh an alienation with warrantie, &c. and dieth, and the warranty deſcendeth to him which hath the reverſion or the remainder, they ſhall be barred by ſuch warrantie.

OF

* *accord* added L. and M. and Roh.
† &c. added L. and M. and Roh.
‡ &c. added L. and M. and Roh.
§ *iſſue* added L. and M. and Roh.
‖ &c. added L. and M. and Roh.
‡ &c. added L. and M. and Roh.

OF this and the ſubſequent Section ſufficient hath beene ſayd before in this Chapter, *Sect.* 697. (11 H. 7. cap. 20 Ant. 365. b.)

"*N'eſt pas remedie per aſcun ſtatute.*" But by a ſtatute made ſince, this caſe is remedied, as you ſee before, *Sect.* 697.

Sect. 726.

ITEM, en le dit caſe, ſi iſſint fuit que quant le tenant en dower alienaſt, ‡ &c. ſon heire fuit deins age, et auxy al temps que le garrantie diſcendiſt ſur luy il fuit deins age; en ceſt cas l'heire poit apres enter ſur l'alienee, nient contriſteant le garrantie diſcendiſt, &c. pur ceo que nul lacheſſe ſerra adjudge en l'heire deins age, que il n'entra pas ſur l'alienee en la vie le tenant en dower. Mes ſi l'heire fuit deins age al temps del alienation, &c. et puis il devient al pleine age en la vie de la tenant en dower, et iſſint eſteant de pleine age il n'entra pas ſur l'alienee en la vie de le tenant en dower, et puis le tenaunt en dower moruſt, &c. la peradventure l'heire ſerra barre per tiel garrantie; pur ceo que il ſerra recte ſa folie, que il eſteant de pleine age ne entra pas en la vie de le tenaunt en dower, &c.

ALSO, in the caſe aforeſaid, if it were ſo that when the tenant in dower aliened, &c. his heire was within age, and alſo at that time that the warrantie deſcended upon him hee was within age; in this caſe the heire may after enter upon the alienee, notwithſtanding the warrantie deſcended, &c. becauſe no lacheſſe ſhal be adjudged in the heire within age, that hee did not enter upon the alienee in the life of tenant in dower. But if the heire were within age at the time of the alienation, &c. and after he commeth to full age in the life of tenant in dower, and ſo being of full age he doth not enter upon the alience in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heire ſhall bee barred by ſuch warrantie; becauſe it ſhall bee accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

HERE note this diverſitie: if the heire bee within age at the time of the diſcent of the warrantie, he may enter and avoyd the eſtate either within age, or at any time after his full age: and *Littleton* ſaith well, that the infant in this caſe may enter upon the alienee; for if he bring his action againſt him, he ſhal be barred by this warrantie, ſo long as the ſtate whereunto the warrantie is annexed continue, and be not defeated by entrie of the heire: but if hee be within age at the time of the alienation with warrantie, and become of full age before the diſcent of the warranty, the warranty ſhal barre him for ever. Our author putteth his caſes where the entrie of the infant is lawfull; [a] for where the entrie of the infant is not lawfull when the warrantie deſcendeth, the warrantie doth binde the infant, as well as a man of full age; and the reaſon thereof is, becauſe the ſtate whereunto the warrantie was annexed, continueth and cannot be avoided but by action, in which

18 E. 4. 13. 35 H. 6. 63. 28 Aſſ. 28. 32 E. 3. Gar. 30. (1 Rep. 120. 140.) (2 Roll. Abr. 773.) 35 H. 6. 63.

[a] 3 H. 7. 9. 35 H. 6. 63. Br. tit. War. 54. 33 H. 8. tit. War. Br. 84. Lib. 1. fol. 67. a. in Archer's caſe.

[380. b.]

‡ &c. added L. and M. and Roh.

& 140. Chudley's caſe. (1 Rep. 66.)

which action the warrantie is a barre: and for the ſame reaſon likewiſe it is of a feme covert, if her entrie be not lawful, a warrantie deſcending on her during the coverture, doth bind her. [w] And albeit the huſband be within age at the diſcent of the warrantie, yet if the entrie of the wife be taken away, the warrantie ſhall binde the wife.

[w] 18 E. 3. 3. (F.N.B. 192. g. 8 Inſt. 483.)

[q] 20 E. 3. Audit. quær. 27. F. N. B. 104. k. 6 E. 3. 39. 17 E. 3. 76. 17 Aſſ. 53. 17. 21 E. 2. 4. 13 E. 3. Aud. quær. 26. 18 E. 3. Intrant. 61. 16 H. 7. 5. 15 E. 4. 5. 8 H. 6. 30. 1 H. 7. 15. (10 Rep. 43.) Sidenf. 321, 322. F. N. B. 104. k. Mour 76. 460. 9 Rep. 30. b. 12 Rep. 122, 123.)

[q] And herein a diverſitie is to bee obſerved betweene matters of record done or ſuffered by an infant, and matters *in fait*; for matters *in fait* he ſhall avoid either within age, or at full age, as hath beene ſaid: but matters of record, as ſtatutes merchants and of the ſtaple, recognizances knowledged by him, or a fine levied by him, recoverie againſt him by default in a reall action (ſaving in dower) muſt be avoyded by him, viz. ſtatutes, &c. by *audita querela*, and the fine and recoverie (1) by writ of error during his minoritie, and the like. And the reaſon thereof is, becauſe they are judiciall acts, and taken by a court or a judge, therefore the nonage of the partie, to avoyd the ſame, ſhall be tried by inſpection of judges, and not by the countrey. And for that his nonage muſt be tried by inſpection, this cannot be done after his full age: and ſo is the law clerely holden at this day, though there be ſome difference in our bookes. But if the age be inſpected by the judges, and recorded that he is within age, albeit he come of full age before the reverſall, yet may it be reverſed after his full age. [*] And ſo was it reſolved by the whole court of king's bench in the caſe of *Kekewiche*.

6 H. 8. Saver de default Br. 50. 3 H. 6. 10. 1 Mar. Dy. 104. (Ant. 131. a. Noy 16.) (Cro. Jac. 59. Yelv. 88. contra)

[*] Paſch. 13 Ja. R. in the king's bench.

If lands had beene given to the huſband and wife and their heires, and the huſband had made a feoffment to another, to whom a collaterall anceſtor of the wife had releaſed and died, and the huſband died, (and this had beene before the ſtatute of 32 *H.* 8.) this warrantie had ſo bound her waiveable right, as ſhe could not waive her eſtate, and claime dower. Otherwiſe it is of an eſtate determined: for if a diſſeiſor make a leaſe to the huſband and wife during the life of the huſband, and the huſband dieth, ſhe may diſagree to this eſtate determined, to ſave herſelfe from dammages. And ſo note a diverſitie betweene an eſtate determined, and an eſtate bound by warrantie.

(Ante 171. b. 246. a. 337. b. 350. b.)

"*Nul laches ferra adjudge en le heire deins age.*" *Laches*, or *laſches*, is an old French word for ſlackneſſe or negligence, or not doing. And the rule (that no negligence ſhall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in reſpect of a former right, as by a diſcent; or of his former right, (as *Littleton* doth here put an example) by a warrantie where his entrie is congeable. But otherwiſe it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence ſhall be adjudged in thoſe caſes aſwell in the infant as in any other.

[y] Pl. Com. Stowel's caſe, 355. &c. (2 Rep. 44. Moor 92. 4 Rep. 4. b. 9 Rep. 85.)

[y] *Vid. Pl. Com. Stowel's caſe per totum.* And ſee further there, where an infant being tenant for life or yeares, ſhall be puniſhed for doing or ſuffering of waſte; and where he claimeth by purchaſe, a *ceſſavit* ſhall lie againſt him, if he pay not his rent by two yeares. And ſome have ſaid, if he have the tenancie by diſcent, and he himſelfe ceaſe, a *ceſſavit* doth lie, and he ſhall not have his age becauſe it is of his owne cauſe.

(1) [See Note 331.]

31 *E.* 3. *Age* 54. But other bookes (as some conceive them) be against that. *Vid.* 9 *Edw.* 3. 50. 28 *E.* 3. 99. 14 *E.* 3. *Age* 88. 2 *E.* and others, which bookes doe not prove that the *cessavit* doth not lye in that case, but the contrary, that hee shall have his age, to the end hee may at his full age certainly know what to plead, or what arrerages to tender; for the land was originally charged with the seigniorie and services.

[381. a.]

* Sect. 727.

(Ant. 52. b. 325.)

MES ore per l'estatute fait 11 *H.* 7. cap. 10. *il est ordeine, si ascun feme discontinue, alien, release, ou confirme ove garrantie ascun terres ou tenements que el tient en dower pur terme de vie, ou en tayle del done sa primer baron, ou de ses ancestors, ou del done d'ascun auter seisie al use le primer baron, ou de ses ancestors, que tous tiels garranties, &c. serront voides; et que bien lirroit a cestuy que avoit cein terres ou tenements, apres la mort de mesme la feme d'entrer.*

BUT now by the statute made 11 *H.* 7. *cap.* 10. it is ordained, if any woman discontinue, alien, release, or confirme with warrantie any lands or tenements which she holdeth in dower for terme of life, or in taile of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestours, that all such warranties, &c. shall be void; and that it shall bee lawfull for him which hath these lands or tenements, after the death of the same woman to enter.

THIS is an addition to *Littleton*, and therefore to be passed over.

And hereof sufficient hath beene said before, *Sect.* 697.

Sect. 728.

ITEM, il est parle en le fine de le dit estatute de Gloucester, *que parle del alienation ovesque garrantie fait per le tenant per le curtesie en cest forme. Ensement, en mesme le manner, ne soit l'heire le feme apres la mort la pere et le mere barre d'action, ill demanda l'heritage ou le mariage sa mere per briefe d'entre, que son pere aliena en temps sa mere, dont nul fine est levy en la court le roy: et issint per force de mesme l'estatute, si le baron del feme aliena l'heritage ou mariage sa feme en fee ove garrantie, &c.*

ALSO, it is spoken in the end of the said statute of *Gloucester*, which speaketh of the alienation with warrantie made by the tenant by the courtesie in this forme. Also, in the same manner, the heire of the woman after the death of the father and mother shall not bee barred of action, if hee demandeth the heritage or the marriage of his mother by writ of entry, that his father alienes in his mother's time, whereof no fine is levied in the king's court: and so by force of the same statute,

* This Section not in L. and M. nor Roh.

*&c. per fon fuit en pais, ceo eſt clere ley, que ceſt garranty ne barrera my l'heire, ſinon que il n'ad aſſets per diſcent.**

ſtatute, if the huſband of the wife alien the heritage or mariage of his wife in fee with warrantie, &c. by his deed in the countrey, it is cleere law, that this warranty ſhall not bar the heire, unleſſe hee hath aſſets by diſcent.

(Ant. 115. a. 360. a. 365. b. 369. a.)
[a] Pl. Com. 2. 75. 7 E. 3. 89. (3 Rep. 31. 59. 4 Rep. 50. b. 58. 76.) Vide Bracton lib. 4. f. 321. Fleta lib. 5. cap. 34. (6 Rep. Gregory's caſe. 5 Rep. 60. 7 Rep. 37. 8 Rep. 90. 118. 138. Plowd. 204, 205, 206. a. 465. 467. a. 11 Rep. 62. b.)

"*DONT nul fine eſt levy en le court le roy, &c.*" Here are three things worthy of obſervation concerning the conſtruction of ſtatutes. Firſt, that [a] it is the moſt naturall and genuine expoſition of a ſtatute to conſtrue one part of the ſtatute by another part of the ſame ſtatute, for that beſt expreſſeth the meaning of the makers. As here the queſtion upon the generall words of the ſtatute is, whether a fine levied onely by a huſband ſeiſed in the right of his wife with warranty ſhall barre the heire without aſſets. And it is well expounded by the former part of the act, whereby it is enacted that alienation made by tenant by the courteſie with warrantie ſhall not bar the heire, unleſſe aſſets deſcend. And therefore it ſhould be inconvenient to intend the ſtatute in [381. b.] ſuch manner, as that he that hath nothing but in the right of his wife ſhould by his fine levied with warrantie barre the heire without aſſets. And this expoſition is *ex viſceribus actûs.*

(10 Rep. 43.)
[b] Pl. Com. 246. b. Seignior Barkleye's caſe. Li. 9. fol. 26. in caſe del Abbot de Strata mercella.
[c] 11 H. 4. 80. 9 E. 4. 12. 21 H. 6. 28. 4 E. 4. 31. 12 H. 4. Formeden 15.

Secondly, the words of an act of parliament muſt bee taken in a lawfull and rightfull ſenſe; as here the words being (whereof no fine is levied in the king's court) are to be underſtood, whereof no fine is lawfully or rightfully levied in the king's court. And therefore [b] a fine levied by the huſband alone, is not within the meaning of the ſtatute, for that fine ſhould worke a wrong to the wife; but a fine levied by the huſband and wife is intended by the ſtatute, for that fine is lawfull and worketh no wrong. [c] So the ſtatute of *W.* 2. *cap.* 5. ſaith (*Ita quod epiſcopus eccleſiam conferat*) is conſtrued, *Ita quod epiſcopus eccleſiam legitimè conferat;* and the like in a number of other caſes in our bookes. And generally the rule is, *Quod non præſtat impedimentum quod de jure non ſortitur effectum.*

(6 Rep. 20.)

Thirdly, that conſtruction muſt be made of a ſtatute in ſuppreſſion of the miſchiefe, and in advancement of the remedie, as by this caſe it appeareth. For a fine levied by the huſband only is within the letter of the law; but the miſchiefe was, the heire was barred of the inheritance of his mother by the warrantie of his father without aſſets: and this act intended to apply a remedy, viz. that it ſhould not barre unleſſe there were aſſets, and therefore the miſchiefe is to be ſuppreſſed, and the remedie advanced. *Et qui hæret in literâ, hæret in cortice*, as often before hath beene ſaid.

* *&c.* added L. and M. and Roh.

Sect. 729.

(2 Inſt. 294.)

MES, le doubt eſt, ſi le baron alienaſt l'heritage ſa feme per fine levy en la court le roy oveſque garrantie, &c. ſi ceo barrera l'heire ſans aſcun diſcent en value. † Et quant a ceo, jeo voile icy dire certaine reaſons, que jeo ay oye dit en ceſt matter. Jeo ay oye mon maſter ſir Richard Newton, *jades chiefe juſtice de common banke, dire un foits en meſme le banke, que tiel garrantie que le baron fait per fine levie en le court le roy barrera l'heire, coment que il ‡ ad riens per diſcent, pur ceo que l'eſtatute dit (dont nul fine eſt levy en le court le roy) ‖; et iſſint* [382. a.] *per ſon opinion cel garrantie per fine ↓ demurt uncore un collateral garrantie, come il fuit a le common ley, nient remedy per le dit eſtatute, pur ceo que le dit eſtatute except alienations per fine ove garrantie.*

BUT the doubt is, if the huſband alien the heritage of his wife by fine levied in the king's court with warrantie, &c. if this ſhall barre the heire without any diſcent in value. And as to this, I will here tell certaine reaſons, which I have heard ſaid in this matter. I have heard my maſter ſir *Richard Newton*, late chiefe-juſtice of the common pleas, once ſay in the ſame court, that ſuch warrantie as the huſband maketh by fine levied in the king's court ſhall barre the heire, albeit hee hath nothing by diſcent, becauſe the ſtatute ſaith (whereof no fine is levied in the king's court); and ſo by his opinion this warrantie by fine remaineth yet a collaterall warrantie, as it was at the common law, not remedied by the ſaid ſtatute, becauſe the ſaid ſtatute excepteth alienations by fine with warrantie.

Sect. 730.

ET aſcuns autres ont dit, et uncore dioni le contrarie, et ceo eſt lour proofe, que come per meſme le chapiter de dit eſtatute il eſt ordeine, que le garrantie le tenant per le curteſie ne ſerra my barre al heire, ſinon que il ad aſſets per diſcent, &c. coment que le tenant per le curteſie levie un fine de meſmes les tenements oveſque garrantie, &c. auxy fortment come il poit faire, uncore cel garranty ne barra my l'heire ſinon que il ad aſſets per diſcent, &c. Et jeo croy que ceo eſt ley; et pur ceo ils dioni, que ſerroit inconvenient d'entender l'eſtatute en tiel

AND ſome others have ſaid, and yet doe ſay the contrary, and this is their proofe, that as by the ſame chapter of the ſaid ſtatute it is ordained, that the warrantie of the tenant by the courteſie ſhall be no barre to the heire, unleſſe that he hath aſſets by diſcent, &c. although that the tenant by the courteſie levie a fine of the ſame tenements with warrantie, &c. as ſtrongly as hee can, yet this warrantie ſhall not barre the heire, unleſſe that hee hath aſſets by diſcent, &c. And I beleeve that this is law; and therefore they ſay, that

† &c. added L. and M. and Roh.
‡ *ad-eſtuit*, L. and M. and Roh.
‖ &c. added L. and M. and Roh.
↓ &c. added L. and M. and Roh.

tiel forme, que un home que n'ad riens forſque en droit ſa feme purroit per fine levie per luy† de meſmes‡ les tenements queux il ad forſque en droit ſa feme ove garranty, &c. barre l'heire de meſmes les tenements ſans aſcun diſcent de fee ſimple, &c. lou le tenant per le curteſie ceo ne puit faire.

that it ſhould be inconvenient to intend the ſtatute in ſuch maner, as a man that hath nothing but in right of his wife might by fine levied by him of the ſame tenements which he hath but in right of his wife with warrantie, &c. barre the heire of the ſame tenements without any diſcent of fee ſimple, &c. where the tenant by the courteſie cannot doo this.

Sect. 731.

(Plowd. 57. b. Ant. 115. a. 360. a. 369. a. 381. b.) (10 Rep. 43. Ant. 381. b.) (2 Inſt. 294.)

MES ils ont dit, que le ſtatute ſerra entend ſolonque cel forme, ſcilicet, *lou le ſtatute§ dit, dont nul fine eſt levie en court le roy, ceo eſt a dire, dont nul loial fine eſt droiturelment levy en la court le roy. Et ceo eſt, dont nul fine de le baron et ſa feme ſoit levie en le court le roy, car al temps de le feſans del dit eſtatute, cheſcun eſtate de terres ou tenements que aſcun home ou feme avoit, que diſcenderoit a ſon heire, fuit fee ſimple ſans condition, ou ſur certaine conditions en fait ou en ley. Et pur ceo que adonques tiel fine poit droiturelment eſtre levie per le baron et ſa feme, et les heires le baron garronteront, &c. tiel garrantie barrera l'heire,† et iſſint ils dionit que ceſt l'entendement de l'eſtatute, car ſi le baron et ſa feme fieront un feoffement en fee per fait en pais, ſon heire apres le deceaſe le baron et ſa feme avera brieſe* d'entre ſur cui in vitâ, &c. *nient obſtant le garrantie de le baron, donque ſi nul tiel exception fuit fait en l'eſtatute de le fine levie, &c. donque l'heire averoit le brieſe* d'entre, &c. *nient obſtant le fine levie per le baron et ſa feme, pur ceo que les parolx de l'eſtatute devant l'exception de fine levie, &c. ſont generals, &c. c'eſtaſcavoir, que l'heire la feme apres le mort*

BUT they have ſaid, that the ſtatute ſhall bee intended after this manner, *ſcilicet,* where the ſtatute ſaith, whereof no fine is levied in the king's court, that is to ſay, whereof no lawfull fine is [382. b.] rightfully levied in the king's court. And that is, whereof no fine of the huſband and his wife is levied in the king's court, for at the time of the making of the ſaid ſtatute, every eſtate of lands or tenements that any man or woman had, which ſhould deſcend to his heire, was fee ſimple without condition, or upon certain conditions in deed or in law. And becauſe that then ſuch fine might rightfully be levied by the huſband and his wife, and the heires of the huſband ſhould warrant, &c. ſuch warrantie ſhall barre the heire, and ſo they ſay that this is the meaning of the ſtatute, for if the huſband and his wife ſhould make a feoffement in fee by deed in the countrie, his heire after the deceaſe of the huſband and wife ſhall have a writ of entrie *ſur cui in vitâ, &c.* notwithſtanding the warrantie of the huſband, then if no ſuch exception were made in the ſtatute of the fine levied, &c. then the heire ſhould have the writ of entrie, &c. notwithſtanding

† *meſme* added L. and M. and Roh.
‡ *meſmes* not in L. and M. nor Roh.
§ *dit—parle,* L. and M. and Roh.
† *&c.* added L. and M. and Roh.

mort le pere et la mere ne ſoit barre d'action, s'il demaund l'heritage ou le mariage ſa mere per briefe d'entre, que ſon pere aliena en temps ſa mere, et iſſint comment que le baron et la feme alienent per fine, uncore ceo eſt voier, que le baron aliena en temps la mere, et iſſint il ſerroit en caſe de l'eſtatute, ſinon que tielx parolx fueront, ſcilicet, *dont nul fine eſt levie en la court le roy; et iſſint ils diont, que ceo eſt a entender, dont nul fine per le baron et ſa feme eſt levie en la court le roy, lequel eſt loialment levie en tiel caſe; car ſi les juſtices ont conuſans, que home que n'ad riens forſque en droit ſa feme, voile levier un fine en ſon noſme ſolement, ils ne voylont, ne * unque devoyent prender tiel fine d'eſtre levie per le baron ſolement ſans † ſa feme, &c.* Ideo quære *de ceſt matter, &c.* ‡

[383. a.]

ing the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are generall, viz. that the heire of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entrie, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should bee in that case of the statute, unlesse that such words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levie a fine in his name onely, they will not neither ought they to take such fine to be levied by the husband alone without his wife, &c. *Ideo quære* of this matter, &c.

"IDEO *ay oye mon maiſter ſir* R. Newton, *&c.*" who was a gentleman of an ancient family; in Latine, *de novâ villâ*; in French, *de neuſe ville*; and a reverend learned judge, and worthily advanced to be chiefe-justice of the court of common pleas, whom our authour remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our authour heard and observed (whose example therein it is necessary for our student to follow); but the latter opinion (as hath beene before observed) being *Littleton's* owne, is against the opinion of the lord *Newton* [d], and the law is holden cleerely with our authour at this day; and our authour (as in all other cases) hath good authoritie in law to warrant his opinion: *Nullius hominis authoritas tantum apud nos valere debet, ut meliora non ſequeremur ſi quis attulerit.*

[d] Bracton 321. Fleta lib. 5. cap. 34. 8 E. 2. Gar. 81. 18 E. 3. 51. 7 E. 3. 24. Pl. Com. 57. (3 Rep. 77.) Sect. 731.

"*Car ſi les juſtices ont conuſance, &c.*" Hereby it appeareth [e] that the judge, if hee knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

[e] 33 H. 6. 56. 5 E. 3. 84. 2 Eliz. Dier 178. 1 H. 7. 9. 1 Mar. Dier. 94. 4 E. 3. 41. 7 Eliz. Dier 246. Vide Sect. 67, &c.

"*Que ſerroit inconvenient.*" *Argumentum ab inconvenienti*, is very forcible in law, as often hath beene observed.

Of the rest of these three Sections sufficient hath beene said before.

* *unque* not in L. and M. nor Roh.
† *noſme* added L. and M. and Roh.
‡ &c. not in L. and M. nor Roh.

Sect. 732.

ITEM, eſt aſcavoir, que en ceux parolx, ou l'heire demande l'heritage, ou le mariage ſa mere, ceſt parol (ou) eſt un disjunctive, et eſt autant a dire, ſi l'heire demande le heritage ſa mere, ſcilicet, les tenements que ſa mere avoit en fee ſimple per diſcent ou per purchaſe, ou ſi l'heire demaund la mariage ſa mere, c'eſtaſcavoir, les tenements que fueront dones a ſa mere en frankmariage.

ALSO, it is to be underſtood, that in theſe words, where the heire demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is aſmuch to ſay, if the heire demand the heritage of his mother, viz. the tenements that his mother had in fee ſimple by diſcent or by purchaſe, or if the heire demaund the marriage of his mother, that is to ſay, the tenements that were given to his mother in frankmariage. [383. b.]

(Ant. 16. a.) Vide Sect. 9.

SOME doe expound heritage of the mother to be the lands which the mother hath by diſcent; and that conſtruction is true, but the ſtatute, by the authoritie of *Littleton*, extendeth alſo where the mother hath it by purchaſe in fee ſimple; for ſo ſaith *Littleton* himſelfe, that this word (inheritance) is not only intended where a man hath lands by diſcent, but where a man hath a fee ſimple by purchaſe, becauſe his heires may inherit him. And albeit it be true, that the ſtatute extendeth to an eſtate in frankmariage acquired by purchaſe, yet doth it extend alſo to all eſtates in taile, aſwell by diſcent as by purchaſe; for that frankmariage is put but for an example.

Sect. 733.

ITEM, come eſt move † en divers faits ceux parolx en Latyne, Ego et hæredes mei * warrantizabimus et imperpetuum defendemus; *il eſt a veier quel effect ad cel parol,* defendemus, *en tiels faits; et il ſemble que il n'ad pas l'effect de garrantie, ne emprent en luy † la cauſe de garrantie; car ſ'il iſſint ſerroit, que il prent effect ou cauſe de garrantie, donques il ſerroit ‡ mitte en aſcuns fines levies en la court le roy: et home ne veiet ‖ ceo unque que ceſt parol* defendemus *fuit en aſcun fines, mes tantſolement ceſt parol* warrantizabimus; *per que ſemble,*

ALSO, where it is contained in divers deedes theſe words in Latin, *Ego et hæredes mei warrantizabimus et imperpetuum defendemus;* it is to bee ſeene what effect this word *(defendemus)* hath in ſuch deeds; and it ſeemeth that it hath not the effect of warrantie, nor comprehendeth in it the cauſe of warranty; for if it ſhould be ſo, that it tooke the effect or cauſe of warrantie, then it ſhould bee put into ſome fines levied in the king's court: and a man never ſaw that this word *(defendemus)* was in any fine, but only

† *move—mute*, L. and M. and Roh.
* *&c.* added L. and M. and Roh.
† *la* not in L. and M. nor Roh.
‡ *mitte—mute*, L. and M. and Roh.
‖ *ceo* not in L. and M. nor Roh.

ſemble, que ceſt parol § *et verbe* warrantizo, ¶ *fait la garrantie, et eſt la cauſe de garrantie, et nul auter verbe en noſtre ley.*

only this word *(warrantizabimus)*; by which it ſeemeth, that this word and verbe *(warrantizo)* maketh the warrantie, and is the cauſe of warrantie, and no other word in our law.

" EGO *et hæredes mei warrantizabimus, et imperpetuum defende-*" *mus.*" Wherein three things are to be obſerved. Firſt, that *hæredes mei* are words of neceſſitie, for otherwiſe the heires are not bound. [*a*] Secondly, though in the clauſe of the warrantie it bee not mentioned to whom, &c. yet ſhall it be intended to the feoffee. [*b*] Thirdly, that the feoffor may by expreſſe words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recoverie in value ſhall bee in fee. [*c*] Of this *Bracton* writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus ſuis tantùm vel tali et hæredibus et aſſignatis et hæredibus aſſignatorum, vel aſſignatis aſſignatorum, et eorum hæredibus, et acquietabimus et defendemus eos totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat ſe et hæredes ad warrantiam propinquos, et remotos, præſentes et futuros, et ſuccedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) ſuſcipit in ſe obligationem ad defendendum ſuum tenementum in poſſeſſione rei datæ et aſſignatos ſuos et eorum hæredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat ſe et hæredes ſuos ad acquietandum ſi quis* [384. a.] *plus petierit ſervitii vel aliud ſervitium quam in carta donationis continetur. Per hoc autem quod dicit (defendemus) obligat ſe et hæredes ſuos ad defendendum ſi quis velit ſervitutem ponere rei datæ contra formam ſuæ donationis.* [*d*] Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et hæredes mei warrantizabimus, &c.* in Latine doe create a warrantie; ſo, I and my heires ſhall warrant, &c. in Engliſh, doth create a warrantie alſo.

[*a*] 6 E. 2. Vouch. 238. 12 E. 2. ib. 262. 14 H. 4. 15.
[*b*] 38 E. 3. 14.
[*c*] Bract. fol. 37. 238, & Lib. 5. 380, 381. Brit. fol. 106. b. Flet. lib. 5. cap. 15, & Lib. 6. cap. 23. 35 H. 8. 8. Gar. 90. F. N. B. 134. b. Brit. ubi ſup. Flet. ubi ſup. 11 H. 6. 48. 6 E. 2. Gar. 262.

[*d*] 46 E. 3. 28. 11 H. 4. 41. 6 E. 2. Vouch. 262. 2 E. 4. 15. a. (Moor 175.)

[*c*] If a man be bound to *A.* in an obligation to defend ſuch lands to *A.* whereof the obligor had infeoffed him for twelve yeares, &c. in this caſe if he be ouſted by a ſtranger without being impleaded, the obligation is forfeit: but if he bee bound to warrant the land, &c. the bond is not forfeited, unleſſe the obligee be impleaded, and then the obligor muſt be readie to warrant, &c.

[*c*] 2 E. 4. 15. tit. Det. 71. (2 Roll. Abr. 396. Cro. Car. 5. Dyer 255. a. Ant. 201. b. 4 Rep. 80. 9 Rep. 61.)

" *Donques il ſerra mit en aſcuns fines, &c.*" Here *Littleton* draweth an argument from the forme and words of a fine; and his reaſon is this: that ſeeing that a fine is the higheſt and ſureſt kinde of aſſurance in law, if *defendemus* had the force of a warrantie, it would have beene contained in fines: and on the other ſide, ſeeing this word *warrantizo* is contained in fines to create a warrantie, that therefore that word doth imply a warrantie, and not the other.

" *Et nul auter verbe en noſtre ley.*" Here it appeareth, that no other verbe in our law doth make a warrantie, but *warrantizo* only, which is only appropriated to create a warrantie.

46 E. 3. 28. Vide Sect. 1.

But,

§ *et verbe* not in L. and M. nor Roh.

¶ *as, &c.* added L. and M.; *&c.* only added in Roh.

Sect. 697.
[*] 31 E. 3. Vouch. 91.
12 Rich. 2. tit. cont. de Vouch. 35.
29 E. 3. 48.
30 E. 3. 6. b. Symkens Symons caſe.
8 E. 3. 61.
12 E. 3. Vouch. 27.
Temps E. 1. Vouch. 302.
3 H. 6. 17.
[f] Leſtat. de Bigamis, c. 6.
2 H. 7. 7.
6 H. 7. 2.
48 E. 3. 2.
31 E. 1. tit. Vouch. 290.
F. N. B. 134. b.
6 E. 2. Vouch. 258. (Vaugh. 118.) (F. N. B. 134. b.)

But, *Qui benè diſtinguit benè docet*; and here of neceſſitie you muſt diſtinguiſh, [*] firſt, betweene a warrantie annexed to a freehold or inheritance, (whereof *Littleton* here ſpeaketh) and a warrantie annexed to a ward, which is a chattell reall; for there, grant, demiſe, and the like, doe make a warrantie. And of warranties annexed to freeholds and inheritances, ſome be warranties in deed, and ſome be warranties in law. A warrantie in deed, or an expreſſe warrantie, (whereof *Littleton* here ſpeaketh) is created only by this word *warrantizo*; but warranties in law are created by many other words; they be therefore called warranties in law, becauſe in judgment of law they amount to a warrantie without this verbe *warrantizo*. [f] As *dedi* is a warrantie in law to the feoffee and his heires during the life of the feoffor, but *conceſſi* in a feoffment or fine implyeth no warrantie. (1) But before the ſtatute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heires, of the donor and his heires, by certain ſervices, then not only the donor but his heires alſo had beene bound to warrantie: but if before that ſtatute a man had given lands by this word *dedi*, to a man and to his heires for ever, to hold of the chiefe lord, there the feoffor had not beene bound to warrantie but during his life, as at this day he is.

And albeit the words of the ſtatute of *bigamis* be, *in cartis autem ubi continentur* (*dedi et conceſſi*, &c.) yet if *dedi* be contained alone, it doth import a warrantie; for the ſtatute doth conclude, *ipſe tamen feoffatur in vitâ ſuâ ratione proprii doni ſui tenetur warrantizare*; ſo as *dedi* is the word that implyeth warrantie, and not *conceſſi*. Alſo where the words of the ſtatute bee further, *ſine clauſulâ quæ continet warrantiam*, the meaning of the ſtatute is, that *dedi* doth import a warrantie in law, albeit there bee an expreſſe warrantie in the deed.

For if a man make a feoffement by *dedi*, and in the deed doth warrant the land againſt *I. S.* and his heires, yet *dedi* is a generall warrantie during the life of the feoffor; and ſo was the ſtatute expounded in both points. [g] *Hil.* 14 *El.* in the court of common pleas, which I myſelfe heard and obſerved. [h] And if a man make a leaſe for life reſerving a rent, and adde an expreſs warrantie, here the expreſſe warrantie doth not take away the warrantie in law, for he hath election to vouch by force of either of them. And in *Nokes'* caſe note a diverſitie betweene a warrantie that is a covenant reall, and a warrantie concerning a chattell. [i] Alſo this word *excambium* doth imply a warrantie.

[g] Hil. 14 El. in Com. Banc.
[h] Lib. 4. fol. 80. in Nokes' caſe. 8 E. 3. 69. 9 E. 3. 15. 10 E. 3. 11. 20 E. 3. Cont. de Gar. 7. 31 E. 3. Vouch. 280. 32 E. 3. ib. 102. 43 E. 3. 3. 2 E. 3. tit. Cui in vita 17. 3 E. 3. Formedon 44.
[i] 4 E. 2. Vouch. 245. 22 E. 3. 3. 24 H. 6. 2. 20 H. 6. 14. Lib. 4. fol. 122. in Buſtard's caſe. 35 E. 3. Bar. 255. 43 E. 3. 3. Lib. 1. f. 96. Lib. 5. fol. 17. Spencer's caſe. Lib. 8. fol. 75. Sr. Stafford's caſe.

Alſo a partition implyeth a warrantie in law, as in the Chapter of Parceners appeareth. And homage auncеſtrell doth draw to itſelfe warrantie, as hath beene ſaid in the Chapter of Homage Auncеſtrell.

And it is to be obſerved, that the warrantie wrought by this word *dedi*, is a ſpeciall warrantie, and extendeth to the heires of the feoffee during the life of the donor only. But upon the exchange and homage anceſtrell the warrantie extendeth reciprocally to the heires, and againſt the heires of both parties: and in none of the caſes the aſſignee ſhall vouch by force of any of theſe warranties, but in the caſe of the exchange and *dedi*, the aſſignee ſhall rebutt, but not in the caſe of homage anceſtrell. [384. b.]

(1) [See Note 338.]

And

[k] And so no man shall have a writ of *contra formam collationis*, but only the feoffee and his heires which be privie to the deed; but an assignee may rebutt by force of the deed. [k] 28 Ass. 33. 14 H. 4. 5. 18 E. 3. 18. 4 E. 2. Avowr. 201 & 202. 19 E. 3. Avowr. 201, 202. 11 E. 3. Avowr. 100. 30 H. 6. 7. 35 H. 8. Dyer 51. 10 H. 7. 11. b. F. N. B. 163. a.

[l] If a man make a gift in taile, or a leafe for life of land, by deed or without deed, reserving a rent, or of a rent service by deed, this is a warrantie in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warrantie in law extendeth not only against the donor or lessor, and his heires, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take benefit of this warrantie in law. [l] 6 E. 2. Cont. de Vouch. 105. 5 E. 3. 67. 4 E. 2. ibid. 102. 6 E. 3. 11. 50. 7 E. 3. 6. 18 E. 3. 8. 22 E. 3. 3. 3 H. 7. 13. 6 H. 7. 2. 14 E. 3. Garr. 32. F. N. B. 134. g. 3 E. 3. 87. 20 E. 3. tit. Counterplea de Gar. 7.

[m] When dower is assigned there is a warrantie in law in-chaired, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable. (1) [m] 4 E. 3. 36. 33 E. 3. tit. Cont. de Vouch. 122. 43 Ass. 32. 50 E. 3. 7. F. N. B. 149. m.

And it is to be understood, that a warrantie in law and assets is in some cases a good bar. [n] In a formedon in the discender the tenant may plead, that the ancestor of the demandant exchanged the land with the tenant for other lands taken in exchange, which descended to the demandant, whereunto he hath entred and agreed; or if he hath not entred and agreed unto the lands taken in exchange, yet the tenant may plead the warrantie in law, and other assets descended. [n] 14 H. 6. 2. 15 E. 3. Bar. 255.

[o] If tenant in taile of lands make a gift in taile, or a leafe for life, rendring a rent, and dieth, and the issue bringeth a formedon in the discender, the reversion and rent shall not barre the demandant, because by his formedon he is to defeat the reversion and rent, *Ex improviso debuit exceptio ejusdem rei, cujus petitur dissolutio.* [o] 38 E. 3. 22, 23, 24. 13 E. 3. Gar. 35.

[p] But if other assets in fee simple doe descend, then this warrantie in law and assets is a good barre in the formedon. [p] 16 E. 3. Age 45.

Here foure things are to be observed: first, that no warrantie in law doth barre any collaterall title, but is in nature of a lineall warrantie: wherein the equitie of the last is to be observed. 18 E. 3. 8. 31 E. 3. Gar. 39.

Secondly, that an expresse warrantie shall never binde the heires of him that maketh the warrantie, unlesse (as hath beene said) they be named: as for example, *Littleton* here saith (*Ego et hæredes mei*); but in case of warranties in law, in many cases the heires shall bee bound to warrantie, albeit they be not named. (1 Rep. 10.)

Thirdly, that in some cases warranties in law doe extend to exaction in value, of speciall lands, and not generally of lands descended in fee simple, as you may see at large in my Reports. Vide Lib. 4. fol. 121. Bustard's case.

[q] Fourthly, that warranties in law may be in some cases created without deed, as upon gifts in taile, leases for life, exchanges, and the like. [q] 40 E. 3. 20. b.

And seeing somewhat hath beene said out of *Bracton* and other antient authors, concerning assignees, it is necessarie to shew who shall take advantage of a warrantie, as assignee by way of voucher, to have recompence in value.

If

(1) [See Note 333.]

[r] If a man infeoffe *A.* and *B.* to have and to hold to them and to their heires, with a clauſe of warrantie, *prædictis A. et B. et eorum hæredibus et aſſignatis:* in this caſe if *A.* dieth, and *B.* ſurviveth and dieth, and the heire of *B.* infeoffeth *C.* he ſhall vouch as aſſignee, and yet he is but the aſſignee of the heire of one of them; for in judgement of law the aſſignee of the heire is the aſſignee of the anceſtor, and ſo the aſſignee of the aſſignee ſhall vouch *in infinitum*, within theſe words, (his aſſignes.)

[r] 14 E. 3. Gar. 33. 13 E. 1. Gar. 83. Lib. 5. fol. 17. b. in Spencer's caſe. 38 E. 3. 21.

[s] If a man infeoffeth *A.* to have and to hold to him, his heires and aſſignes; *A.* infeoffeth *B.* and his heires, *B.* dieth, the heire of *B.* ſhall vouch as aſſignee to *A.*: ſo as heires of aſſignees, and aſſignees of aſſignes, and aſſignees of heires are within this word (aſſignes); which ſeemed to be a queſtion in *Bracton's* time. And the aſſignee ſhall not only vouch, but alſo have a *warrantia cartæ*.

[s] 12 E. 2. Vouch. 263. 19 E. 2. Gar. 85. 13 E. 1. ib. 93. Lib. 5. fol. 17. Spencer's caſe. 7 E. 3. 34. 10 E. 3. 9. 14 E. 3. Garr. 33. Bract. ubi ſup. 9 E. 2. Garr. de Chart. 30. 36 E. 3. Gar. 1. 4 H. 8. Dy. 1. F. N. B. 135.

If a man doth warrant land to another without this word (heires), his heires ſhall not vouch: and regularly if he warrant land to a man and his heires, without naming aſſignes, his aſſignee ſhall not vouch. [t] But if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his eldeſt ſon with warrantie and dieth, the law giveth to the ſonne advantage of the warrantie made to his father, becauſe by act in law the warrantie betweene the father and the ſonne is extinct.

[t] 43 E. 3. 23. 26 E. 3. 68. (Ante 174. a. b. Poſt. 390. a.) 40 E. 3. 14. 24 E. 3. 36. 11 H. 4. 94. 39 E. 3. 17. 5 E. 3. Age 19. Pl. Com. 418.

But note, there is a diverſitie betweene a warrantie that is a covenant reall, which bindeth the partie to yeeld lands or tenements in recompence, and a covenant annexed to the land, which is to yeeld but dammages, for that a covenant is in many caſes extended further than the warrantie. As for example:

[u] It hath beene adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquire her and her heires of a ſuit that iſſued out of the land [385. a.] the covenantee aliened. In that caſe the aſſignee ſhall have an action of covenant; and yet he was a ſtranger to the covenant, becauſe the acquitall did runne with the land.

[u] 42 E. 3. b. per Finchden. (5 Rep. 18. a. in Spencer's caſe.)

[x] *A.* ſeiſed of the mannor of *D.* whereof a chappell was parcell, a prior with the aſſent of his covent covenanteth by deed indented with *A.* and his heires to celebrate divine ſervice in his ſaid chappell weekely, for the lord of the ſaid mannor, and his ſervants, &c. In this caſe the aſſignees ſhall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor. [y] But if the covenant had beene with a ſtranger to celebrate divine ſervice in the chappell of *A.* and his heires, there the aſſignee ſhall not have an action of covenant; for the covenant cannot be annexed to the mannor, becauſe the covenantee was not ſeiſed of the mannor. See in *Spencer's* caſe before remembred, divers other diverſities betweene warranties and covenants which yeeld but dammages.

[x] 42 E. 3. 3. a. Laur. Pakenham's caſe. 2 H. 4. 6. 6 H. 4. 1 & 2. Ralfe Brabſon's caſe. Lib. 5. fol. 17, 18. Spencer's caſe. [y] 2 H. 4. 6. Hen. Horne's caſe. 6 H. 4. 1. Lib. 5. fol. 17, 18. Spencer's caſe.

And here it is to be obſerved, that an aſſignee of part of the land ſhall vouche as aſſignee. [*] As if a man make a feoffement in fee of two acres to one, with warrantie to him, his heires and aſſignes, if he make a feoffement of one acre, that feoffee ſhall vouche as aſſignee; for there is a diverſitie betweene the whole eſtate

[*] 18 E. 3. 52. 10 E. 3. 58. 5 E. 3. 40. 12 E. 3. Counterplea de

eſtate in part, and part of the eſtate in the whole, or of any part. As if a man hath a warrantie to him, his heires, and aſſignes, and he make a leaſe for life, or a gift in taile, the leſſee or donee ſhall not vouch as aſſignee, becauſe he hath not the eſtate in fee ſimple whereunto the warranty was annexed; but the leſſee for life may pray in aide, or the leſſee or donee may vouch the leſſor or donor, and by this meanes hee ſhall take advantage of the warranty. But if a leaſe for life, or a gift in taile be made, the remainder over in fee, ſuch a leſſee or donee ſhall vouch as aſſignee, becauſe the whole eſtate is out of the leſſor, and the particular eſtate and the remainder doe in judgement of law to this purpoſe make but one eſtate.

Vouch. 42. 14 E. 3. Voucher 108. 5 E. 3. ibid. 178. 13 E. 3. ibid. 129. 40 E. 3. 22. 41 E. 3. Vouch. 69 & 100. 32 E. 3. ibid. 96. H b 25.)

And this diverſitie was agreed Hill. 14 Eliz. in Communi Banco, which I heard and obſerved.

[a] If a man infeoffe three with warrantie to them and their heires, and one of them releaſe to the other two, they ſhall vouch; but if he had releaſed to one of the other, the warrantie had beene extinct for that part, for he is an aſſignee.

[a] 40 E. 3. 14. 40 Aſſ. 5. 33 H. 6. 4. 37 H. 8. Alienation fans licence 31. 8 H. 4. 8.

[b] If a man doth warrant land to two men and their heires, and the one make a feoffment in fee, yet the other ſhall vouch for his moitie. If a man at this day be infeoffed with warrantie to him, his heires, and aſſignes, and he make a gift in taile, the remainder in fee, the donee make a feoffement in fee, that feoffee ſhall not vouch as aſſignee, becauſe no man ſhall vouch as aſſignee, but he that commeth in, in privitie of eſtate; but he muſt vouch his feoffor, and he to vouch as aſſignee, but ſuch an aſſignee may rebutte. If the warrantie be made to a man and his heires without this word (aſſignes), yet the aſſignee, or any tenant of the land may rebutte. And albeit no man ſhall vouch or have a *warrantia cartæ*, either as partie, heire, or aſſignee, but in privitie of eſtate, yet any that is in of another eſtate, be it by diſſeiſin, abatement, intruſion, uſurpation, or otherwiſe, ſhall rebutte by force of the warrantie, as a thing annexed to the land, which ſometime was doubted [c] in our bookes. But herein is a diverſitie to be obſerved, when in the caſes aforeſaid he that rebutteth claimeth under the warrantie; and when he that would rebutte claimeth above the warranty, for there he ſhall not rebutte. And therefore if lands be given to two brethren in fee ſimple, with a warranty to the eldeſt and his heires, the eldeſt dieth without iſſue, the ſurvivor albeit he be heire to him, yet ſhall he neither vouch nor rebutte, nor have a *warrantia cartæ*, becauſe his title to the land is by relation above the fall of the warrantie, and he commeth not under the eſtate of him to whom the warrantie is made, as the diſſeiſor, &c. doth.

[b] 11 R. 2. Detin. 46. 7 E. 3. 35. 46 E. 3. 4. (See Vaugh. 388.)

[c] 38 E. 3. 21. 26 E. 3. 56. Lib. 10. fo. 96. b. Seymour's caſe. 7 E. 3. 34, 35. 8 E. 3. 10. 46 E. 3. 4. 10 E. 3. 42. 45 E. 3. 18. 10 Aſſ. 5. 35 Aſſ. 9. 22 Aſſ. 39. 88. 31 Aſſ. 13.

[d] If a man make a gift in taile at this day, and warrant the land to him, his heires and aſſignes, and after the donee make a feoffement and dieth without iſſue, the warrantie is expired as to any voucher or rebutter, for that the eſtate in taile whereunto it was knit is ſpent: otherwiſe it is, if the gift and feoffement had beene made before the ſtatute of *donis conditionalibus*; for then both the donee and feoffee had a fee ſimple; and ſo are our bookes to be intended in this and the like caſes.

[d] Lib. 3. fol. 62, 63. Lincolne College caſe.

[e] If *A.* be ſeiſed of lands in fee, and B. releaſeth unto him or confirmeth his eſtate in fee with warrantie to him, his heires and aſſignes; all men agree this warrantie to be good: but ſome have holden, that no warrantie can be raiſed upon a bare releaſe or confirmation

[e] 14 E. 3. Garr. 108. 12 H. 7. 1.

firmation without paſſing ſome eſtate or tranſmutation of poſſeſſion.

[f] 11 H. 4. 22. 10 E. 3. 52. 21 E. 3. 27. Vid. Sect. 706. 738 & 745.

[f] But the law, as it appeareth by *Littleton* himſelfe, is to the contrary, and that both the party, and (as ſome doe hold) his aſſignee ſhall vouch; but he that is vouched in that caſe muſt be preſent in court, and ready to enter into the warranty and to anſwer, and the tenant muſt ſhew forth the deed of releaſe or confirmation with warrantie, to the intent the demandant may have an anſwer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he to whom it was made had nothing in the land, &c. for otherwiſe the demandant may counterplead the voucher by the ſtatute of *W.* 1. viz. that neither vouchee nor any of his anceſtors had any ſeiſin whereof he might make a feoffement. And this is grounded upon the ſaid ſtatute of *W.* 1. the words whereof be, *S'il veit ſon garrantor en preſent*, (1) *que luy voille garranter de ſon gree, et maintenant entre en reſpons*, otherwiſe the tenant muſt be driven to his *warrantia cartæ*.

W. 1. cap. 40.

[385. b.]

Vide 20 E. 1. Statute devocat. ad warrant.

[g] 22 H. 6. 15. 19 H. 6. 73. 24 H. 6. 73. 2 H. 4. 13.

[g] But a warrantie of it ſelfe cannot enlarge an eſtate; as if the leſſor by deed releaſe to his leſſee for life, and warrant the land to the leſſee and his heires, yet doth not this enlarge his eſtate.

41 E. 3. Garr. 15. 43 E. 3. 17. 43 Aſſ. 42. 12 Aſſ. 17. 12 E. 3. taile 3. 22 E. 4. 16. b. 44 E. 3. 10. 44 Aſſ. Baſſingborn's. Aſſ. Lib. 10. fol. 97. Seymour's caſe.

[h] Lib. 3. fol. 63. Lincolne College caſe.

[h] If a man make a feoffement in fee with warrantie to him, his heires and aſſignes by deed (as it muſt be), and the feoffee enfeoffeth another by parol, the ſecond feoffee ſhall vouche, or have a *warrantia cartæ* (as hath beene ſaid) as aſſignee, albeit he hath no deed of the aſſignment, becauſe the deed comprehending the warrantie, doth extend to the aſſignees of the land; and he is a ſufficient aſſignee, albeit he hath no deed.

[i] 29 E. 3. 70. 17 E. 2. Joinder in action. 1. 11 E. 4. 8.

[i] If a man infeoffe two, their heires and aſſignes, and one of them make a feoffement in fee, that feoffee ſhall not vouch as aſſignee. (2)

If a man make a feoffement in fee to *A.* his heires and aſſignes, *A.* infeoffeth *B.* in fee, who re-infeoffeth *A.* he or his aſſignes ſhall never vouche, for *A.* cannot be his owne aſſignee. But if *B.* had infeoffed the heire of *A.* he may vouche as aſſignee; for the heire of *A.* may be aſſignee to *A.* inaſmuch as he claimeth not as heire.

[k] 14 H. 4. 3.

[k] If a man make a feoffement by deed of lands to *A.* to have and to hold to him and his heires, and bind him and his heires to warrant the land *in formâ prædictâ*; this warrantie ſhall extend to the feoffee and his heires: but if he had warranted the land to the feoffee the warrantie had not extended to his heires, except the words had beene to him and his heires.

(Ant. 20. b.)

If a man letteth lands for life, the remainder in taile, the remainder *eâdem formâ*, this is a good eſtate taile, *quia idem ſemper refertur proximo præcedenti*. (3)

(1) i. e. if he have not his *warrantor* preſent.

(2) [See Note 334.]

(3) [See Note 335.]

Sect. 734.

*ITEM, ſi tenant en taile ſoit ſeiſie des *terres deviſables per teſtament ſolonque le cuſtome, &c. et le tenant en tayle alien† meſmes les tenements a ſon frere en fee, et ad iſſue, et devie, et puis ſon frere deviſa per ſon teſtament meſmes les tenements a un auter en fee, et oblige luy et ſes heires a garrantie, &c. et moruſt ſans iſſue; il ſemble que ceſt garrantie ne barrera my l'iſſue en tayle, s'il voit ſues ſon briefe de* formedon, *pur ceo que ceſt garrantie ne diſcendera my al iſſue en le tayle, entant que le uncle del iſſue ne fuit my oblige a le garrantie en ſa vie: ne ‡ que il ne puiſſoit garranter les tenements en ſa vie, entant que le deviſe ne puiſſoit prender aſcun execution ou effect, forſque apres ſon deceaſe. Et entant que le uncle en ſon vie ne fuit tenus de garranter, tiel garrantie ne poit diſcender de luy al iſſue en le tayle, &c. car nul choſe poit diſcender del auncеſter a ſon heire, ſinon que meſme ceo fuit eu l'auncеſter.*

[386. a]

ALSO, if tenant in taile be ſeiſed of lands deviſable by teſtament after the cuſtome, &c. and the tenant in the tayle alieneth the ſame tenements to his brother in fee, and hath iſſue, and dieth, and after his brother deviſeth by his teſtament the ſame tenements to another in fee, and bindeth him and his heires to warrantie, &c. and dieth without iſſue; it ſeemeth that this warrantie ſhall not barre the iſſue in the taile, if hee will ſue his writ of *formedon*, becauſe that this warrantie ſhall not deſcend to the iſſue in tayle, in ſo much as the uncle of the iſſue was not bound to the ſame warrantie in his life-time: neither could hee warrant the tenements in his life, inſomuch as the deviſe could not take any execution or effect until after his deceaſe. (4) And inſomuch as the uncle in his life was not held to warrantie, ſuch warrantie may not deſcend from him to the iſſue in the tayle, &c. for nothing can deſcend from the anceſtour to his heire, unleſſe the ſame were in the anceſtour. (1)

HERE our author declareth one of the maximes of the common law, that the heire ſhall never be bound to any expreſſe warrantie, but where the anceſtor was bound by the ſame warranty; for if the anceſtor were not bound, it cannot deſcend upon the heire, which is the reaſon here yeelded by *Littleton*. [*l*] If a man make a feoffement in fee, and binde his heires to warrantie, this is void by the warrant of this maxime, as to the heire, becauſe the anceſtor himſelfe was not bound. Alſo, if a man binde his heires to pay a ſumme of money, this is void. And of the other ſide, if a man binde himſelfe to warranty, and binde not his heires, they be not bound; for he muſt ſay, as it appeareth before, *Ego et hæredes mei warrantizabimus*, &c. [*m*] And *Fleta* ſaith, *Nota quòd hæres non tenetur in Angliâ ad debita antecеſſoris reddenda, niſi per antecеſſorem ad hoc fuerit obligatus, præterquàm debita regis tantùm; A fortiori* in caſe of warrantie, which is in the realtie.

(6 Rep. 33. 2 Cro. 570. 10 Rep. 95.)

[*l*] 31 E. 1. Grant. 85. (Hob. 150. Ant. 213. b.)

Bracton li. 2. fo. 37. 238. Britt. fol. 106. b.

[*m*] Fleta lib. 2. cap. 55. Britton fol. 65 b. 11 H. 6. 43. (4 Rep. 80. Ante 209. a.)

But

* *terres—tenements*, L. and M. and Roh.
† *meſmes* not in L. and M. nor Roh.
‡ *que il ne* not in L. and M. nor Roh.

(4) [See Note 336.]

(1) [See Note 337.]

But a warrantie in law may binde the heire, although it never bound the anceſtour, and may be created by a laſt will and teſta-
[n] 18 E. 3. 8. ment. [n] As if a man deviſe lands to a man for life or in taile reſerving a rent, the deviſee for life or in taile ſhall take advantage of this warrantie in law, albeit the anceſtor was not bounden, and ſhall binde his heires alſo to warrantie, although they be not named. Alſo an expreſſe warrantie cannot be created without deed, and a will in writing is no deed, and therefore an expreſſe warrantie cannot be created by will.

Sect. 735.

*AUXY, un garrantie ne poit aler * ſolonque la nature des tenements per le cuſtome, &c. mes tantſolement ſolonque le forme del common ley. Car ſi le tenant en taile ſoit ſeiſie des tenements en burgh Engliſh, lou le cuſtome eſt, que touts les tenements deins meſme le borough devoyent diſcender a le fits puiſne, et il diſcontinua le tayle ove garrantie, &c. et ad iſſue deux fits, et moruſt ſeiſie des auters terres ou tenements en meſme le burgh en fee ſimple a le value ou pluis de les tenements tailes, &c. uncore le puiſne fits avera un* formedon *de les † terres tailes, et ne ſerra my barre per le garrantie ſon pere, coment que aſſets a luy diſcendiſt en fee ſimple de meſme le pere, ſolonque le cuſtome, &c. pur ceo que le garrantie diſcendiſt a ſon eigne frere que eſt en pleine vie ‡, et nemy ſur le puiſne. ‖ Et en meſme le maner eſt de collaterall garrantie fait de tiels tenements, lou le garrantie diſcendiſt ſur l'eigne fits, &c. ceo ne barrera my le puiſne fits, &c.*

ALSO, a warranty cannot goe according to the nature of the tenements by the cuſtome, &c. but onely according to the forme of the common law. For if the tenant in taile be ſeiſed of tenements in borough Engliſh, where the cuſtome is, that all the tenements within the ſame borough ought to deſcend to the youngeſt ſonne, and hee diſcontinueth the taile with warranty, &c. and hath iſſue two ſonnes, and dyeth ſeiſed of other lands or tenements in the ſame borough in fee ſimple of the value or more of the lands entailed, &c. yet the youngeſt ſonne ſhall have a *formedon* of the lands tailed, and ſhall not bee barred by the warrantie of his father, albeit aſſets deſcended to him in fee ſimple from his ſaid father according to the cuſtome, &c. be- [386. b.] cauſe the warranty deſcendeth upon his elder brother who is in full life, and not upon the youngeſt. And in the ſame manner is it of collaterall warranty made of ſuch tenements, where the warranty deſcendeth upon the eldeſt ſonne, &c. this ſhall not barre the younger ſon, &c.

* *ſolonque—ſans*, L. and M. and Roh.
† *terres—tenements*, L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
‖ *Et* not in L. and M. nor Roh.

Sect. 736.

(8 Rep. 86.)

EN meſme le maner eſt de tenements en le countie de Kent, queux ſont appelles gavelkind, les queux tenements ſont departibles enter les freres, &c. ſolonque la cuſtome‡; ſi aſcun tiel garrantie ſoit fait per ſon auncеſter, tiel garrantie diſcendera tantſolement al heire que eſt heire al common ley, §c'eſtaſçavoir, al eigne frere, ſolonque la conuſans del common ley, et nemy a touts les heires queux ſont heires de tiels tenements ſolonque le cuſtome‖.

IN the ſame manner is it of lands in the county of Kent, that are called gavelkinde, which lands are dividable betweene the brothers, &c. according to the cuſtome; if any ſuch warrantie be made by his anceſtor, ſuch warrantie ſhall deſcend onely to the heire which is heire at the common law, that is to ſay, to the elder brother, according to the conuſance of the common law, and not to all the heires that are heires of ſuch tenements according to the cuſtome.

HEREUPON a diverſitie is to be obſerved betweene the lien reall, and the lien perſonall, for the lien reall, as the warrantie, doth ever deſcend to the heire at the common law; [*n*] but the lien perſonall doth binde the ſpeciall heires, as all the heires in gavelkind, and the heire on the part of the mother, as hath beene ſaid.

[*o*] If two men make a feoffement in fee with a warranty, and the one die, the feoffee cannot vouche the ſurvivor only, but the heire of him that is dead alſo; (1) but otherwiſe, if two joyntly binde themſelves in an obligation, and the one die, the ſurvivor only ſhall be charged.

Vid. Sect. 603. 718 & 737. (2 Rep. 25.)
[*n*] 11 E. 3. Det. 7. 11 H. 7. 12.
[*o*] 17 E. 3. Joint. 41. 16 H. 7. 13. 29 E. 3. 46. 12 H. 7. 3. 22 E. 3. 1.

17 E. 3. 8. 30 E. 3. 40. 19 H. 6. 55. Lib. 8. fol. 14. Matthew Herbert's caſe. (1 Leon. 322. March. 125. Allen 41. Savil. 692. Clay. 3.)

Sect. 737.

ITEM, ſi tenant en le taile ad iſſee deux files per divers venters, et moruſt, et les files entront, et un eſtrange eux diſſeiſiſt de meſmes les tenements, et l'un de ¶ eux releſſa per ſon fait a le diſſeiſor tout ſon droit, et oblige luy et ſes heires a garrantie, et moruſt ſans iſſue: en ceſt caſe [387. a.] *la ſoer que ſurveſquiſt poit bien enter et ouſter le diſſeiſor de touts les tenements, pur ceo que tiel garrantie*

ALSO, if tenant in taile hath iſſue two daughters by divers venters, and dieth, and the daughters enter, and a ſtranger diſſeiſeth them of the ſame tenements, and one of them releaſeth by her deed to the diſſeiſor all her right, and binde her and her heires to warrantie, and die without iſſue: in this caſe the ſiſter which ſurviveth may well enter, and ouſt the diſſeiſor of all the tenements, becauſe

‡ &c. added L. and M. and Roh.
§ *c'eſtaſçavoir al eigne frere, ſolonque la conuſans del common ley*, not in L. and M. nor Roh.
‖ &c. added L. and M. and Roh.
¶ *eux—les filles*, L. and M. and Roh.

(1) [See Note 338.]

rantie n'eſt pas diſcontinuance ne collateral garrantie a la ſoer que ſurveſquiſt, pur ceo que ils ſont de demy ſanke, et l'un ne poit eſtre heire a l'auter, ſolonque le cours del commonley. Mes auterment eſt, lou y ſont files del tenant en taile per un meſme venter.

becauſe ſuch warrantie is no diſcontinuance nor collaterall warrantie to the ſiſter that ſurviveth, for that they are of halfe bloud, and the one cannot be heire to the other, according to the courſe of the common law. But otherwiſe it is, where there bee daughters of tenant in taile by one venter.

THE reaſon of this is in reſpect of the halfe bloud, whereof ſufficient hath beene ſaid in the firſt booke, in the Chapter of Fee Simple.

(Ante 13. a. 14. 2).

Two brothers be by demy venters; the eldeſt releaſeth with warrantie to the diſſeiſor of the uncle, and dieth without iſſue, the uncle dieth, the warrantie is removed, and the younger brother may enter into the land.

Sect. 738.

*ITEM, ſi tenant en taile leſſa les tenements a un *home pur terme de vie, le remainder a un auter en fee, et un collateral aunceſter confirma le ſtate del tenant a terme de vie, et oblige luy et ſes heires a garrantie pur terme de vie del tenant a terme de vie, et moruſt, et le tenant en taile ad iſſue et devie; ore l'iſſue eſt barre a demander les tenements per briefe de* formedon *durant le vie le tenant a terme de vie, per cauſe del collateral garrantie diſcendu ſur le iſſue en le taile. Mes apres le deceaſe de le tenant a terme de vie, l'iſſue avera un †briefe de* formedon, &c.

ALSO, if tenant in taile letteth the lands to a man for terme of life, the remainder to another in fee, and a collaterall anceſtor confirmeth the ſtate of the tenant for life, and bindeth him and his heires to warrantie for terme of the life of the tenant for life, and dieth, and the tenant in taile hath iſſue and dies; now the iſſue is barred to demand the tenements by writ of *formedon* during the life of tenant for life, becauſe of the collaterall warrantie deſcended upon the iſſue in taile. But after the deceaſe of the tenant for life, the iſſue ſhall have a writ of *formedon*, &c.

Vide Sect. 733. & 706. (Ant. 385.)

HERE it appeareth, that a warrantie may be raiſed by a confirmation which transferreth neither eſtate nor right, whereof ſufficient hath beene ſaid before.

[p] 38 E. 3. 14. 10 E. 3. Vouch. 87. (4 Rep. 80. Ant. 383. Hob. 136.)

"*A garrantie pur terme de vie*, &c." [p] This proveth that a warrantie may be limited, and that a man may warrant lands aſwell for terme of life or in taile, as in fee. (1)

If tenant in fee ſimple that hath a warrantie for life, either by an expreſſe warrantie or by *deed*, be impleaded and vouch, hee ſhall recover a fee ſimple in value, albeit his warrantie were but for terme of life, becauſe the warrantie extended in that caſe to the whole

* *home* not in L. and M. nor Roh. † *briefe de* not in L. and M. nor Roh.

(1) [See Note 339.]

whole eſtate of the feoffee in fee ſimple; (2) but in the caſe that *Littleton* here putteth, the tenant for life ſhall recover in value but an eſtate for life, becauſe the warrantie doth extend to that eſtate only. (2 Cro. 453.)

"*Un briefe de formedon, &c.*" Here is implyed, that a collaterall warrantie giveth no right, but ſhall barre only for life, and after the partie is reſtored to his action. (F. N. B. 211. b. 217. b. 219. e.)

[387. b.]

It is alſo to bee obſerved, that a warrantie may deſcend to the heires of him that made it during the life of another.

Sect. 739. (9 Rep. 120.)

ET ſur ceo jeo aye oye un reaſon, que cel caſe provera un auter caſe, ſcilicet, ſi un home leſſa ſes terres a un auter, a auer et tener a luy et a ſes heires pur terme d'auter vie, et le leſſee moruſt vivant celuy a que vie, &c. et un eſtrange enter en la terre que la heire le leſſee luy poit ouſter, † &c. pur ceo que en le caſe procheine avantdit, entant que home poit obliger luy et ſes heires a garrantie al tenant a terme de vie tantſolement, durant la vie le tenant a ‡ terme de vie, et cel garrantie diſcendiſt al heire celuy que fiſt le garrantie, lequel garrantie n'eſt pas garrantie d'enheritance, mes tantſolement pur terme d'auter vie: per meſme le reaſon lou tenements ſont leſſés a un home, a auer et tener a luy et a ſes heires pur terme d'auter vie, ſi le ‖ leſſee moruſt vivant celuy a que vie, ſon heire avera les tenements, vivant celuy a que vie, &c. Car ont dit, que ſi home grant un annuitie a un auter, a auer et perceiver a luy et a ſes heires pur terme d'auter vie, ſi le grantee moruſt, &c. que apres § ſon mort ſon heire avera l'annuitie durant la vie celuy a que vie, &c. Quære de iſtâ materiâ.

AND upon this I have heard a reaſon, that this caſe will prove another caſe, viz. if a man letteth his lands to another, to have and to hold to him and to his heires for terme of another's life, and the leſſee dieth living *celuy a que vie, &c.* and a ſtranger entreth into the land that the heire of the leſſee may put him out, &c. becauſe in the caſe next aforeſaid, inaſmuch as a man may binde him and his heires to warrantie to tenant for life only, during the life of the tenant for life, and this warrantie deſcendeth to the heire of him which made the warrantie, the which warrantie is no warrantie of inheritance, but only for terme of another's life: by the ſame reaſon where lands are let to a man, to have and to hold to him and his heires for terme of another's life, if the leſſee die living *celuy a que vie*, his heires ſhall have the lands, living *celuy a que vie, &c.* For they have ſaid, that if a man grant an annuitie to another, to have and to take to him and his heires for terme of another's life, if the grantee die, &c. that after his death his heire ſhall have the annuitie during the life of *celuy a que vie, &c. Quære de iſtâ materiâ.*

« *JEO*

† *&c.* not in L. and M. nor Roh.
‡ *terme* not in L. and M. nor Roh.
‖ *leſſee—pier*, L. and M. and Roh.
§ *ſon mort* not in L. and M. nor Roh.

(2) [See Note 340.]

"*JEO ay oye un reaſon.*" Here our ſtudent is taught after the example of our author, to obſerve everie thing that is worth the noting. [388. a.]

"*Si un home leſſa terres a un auter, &c.*" This caſe is without queſtion, [q] that the heire of the leſſee ſhall have the land to prevent an occupant. And ſo it is (as *Littleton* here ſaith) in caſe of an annuitie, or of any other thing that lieth in grant, whereof there can be no occupant. And of this ſomewhat hath beene ſaid in the Chapter of Diſcents. (1)

[q] 17 E. 3. 48. 16 E. 3. 12. 11 H. 4. 42. 7 H. 4. 46. 8 H. 4. 15. Dy. 8 El. 253.

18 H. 8. 3. 27 H. 8. 21 H. 8. tit. Eſtat. Br. 50. 19 E. 3. tit. Account. 56. 33 Aſſ. p. 17. 22 H. 6. 33. 39 E. 3. 37. Vide Sect. 387. (Ante 41. b.)

Sect. 740.

*MES lou tiel leaſe ou grant eſt fait a un home et a ſes heires pur terme d'ans, en ceſt caſe l'heire le leſſee ou le grantee n'avera unques apres la mort le leſſee ou le grantee ceo que eſt iſſint leſſee ou grant, pur ceo que eſt chattel real, et * chateux realx per le common ley viendra al executors del grantee, ou del leſſee, et nemy al heire.* †

BUT where ſuch leaſe or grant is made to a man and to his heires for terme of yeares, in this caſe the heire of the leſſee or the grantee ſhall not after the death of the leſſee or the grantee have that which is ſo let or granted, becauſe it is a chattell reall, and chattels realls by the common law ſhall come to the executors of the grantee, or of the leſſee, and not to the heire.

11 E. 3. tit. Aſſ. 88. 11 Aſſ. 21. 10 El. Dy. 276. (9 Rep. 86. 5 Rep. 25, 33.)

HERE is a generall rule, that chattels reals aſwell as chattels perſonals ſhall goe to the executors or adminiſtrators of the leſſee, and not to his heires. For as eſtates of inheritance or freehold deſcendible ſhall go to the heire, ſo chattels, aſwell reall as perſonall, ſhall goe to the executors or adminiſtrators.

[r] 24 E. 3. 26. F. N. B. 33. b. F. N. B. 34. a. (Ant. 90. Sect. 125.)

[r] But if the king's tenant by knight's ſervice *in capite* be ſeiſed of a mannor, whereunto an advowſon is appendant, and the church become void, the tenant dieth, his heire within age, the king ſhall preſent to the church, and not the executor or adminiſtrator: but if the land be holden of a common perſon, in that caſe the executor ſhall preſent, and not the gardeine.

[s] 40 E. 3. 14.

[s] If a biſhop hath a ward fallen and dieth, the king ſhall not have the ward nor the ſucceſſor, but the executor and the ward ſhall be aſſets in his hands. So it is of the heriot, releefe, and the like.

[t] 9 H. 6. 58. 11 H. 4. 7.

[t] But if a church become void in the life of a biſhop, and ſo remaine untill after his deceaſe, the king ſhall preſent thereunto, and not the executor or adminiſtrator; for nothing can be taken for a preſentment, and therefore it is no aſſets.

* *tenti* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) But ſeveral alterations have been made in the law of occupancy, by ſtatutes paſſed ſince ſir Edward Coke's time. See ant. 41. b. note 5.

Sect. 741.

ITEM, en aſcun caſes il poit eſtre, que coment que un collaterall garrantie ſoit fait en fee, &c. uncore tiel garrantie poit eſtre defeat et anient. Sicome tenant en taile diſcontinue le taile en fee, et le diſcontinuee eſt diſſeiſie, et le frere del tenant en le taile releſſa per ſon fait a le diſſeiſor tout ſon droit, &c. ove garranty en fee, et moruſt ſans iſſue, et le tenant en le taile ad iſſue et devie; ore l'iſſue eſt barre de ſon action per force del collateral garrantie diſcendue ſur luy. Mes ſi apres ceo le diſcontinuee enter ſur le diſſeiſor, donques poit l'heire en le taile aver bien ſon action de formedon, &c. *pur ceo que le garrantie eſt anient et defeate, car quant garrantie eſt fait a un home ſur eſtate que adonques il avoit, ſi l'eſtate ſoit defeat, le garrantie eſt defeat.*

ALSO, in ſome caſes it may bee, that albeit a collaterall warrantie be made in fee, &c. yet ſuch a warrantie may be defeated and taken away. As if tenant in taile diſcontinue the taile in fee, and the diſcontinuee is diſſeiſed, and the brother of the tenant in taile releaſeth by his deed to the diſſeiſor all his right, &c. with warrantie in fee, and dieth without iſſue, and the tenant in taile hath iſſue and die; now the iſſue is barred of his action by force of the collaterall warrantie deſcended upon him. But if afterwards the diſcontinuee entreth upon the diſſeiſor, then may the heire in taile have well his action of *formedon, &c.* becauſe the warrantie is taken away and defeated, for when a warrantie is made to a man upon an eſtate which hee then had, if the eſtate be defeated, the warrantie is defeated. (1)

"*ET moruſt ſans iſſue, &c.*" Here (as before in this Chapter hath been noted) the collaterall warrantie doth deſcend upon the iſſue in taile, before any right doth deſcend unto him, wherein this diverſitie is to bee obſerved. Where the right is in *eſſe* in any of the anceſtors of the heire, at the time of the diſcent of [388. b.] the collaterall warrantie, there albeit the warrantie deſcend firſt, and after the right doth deſcend, the collaterall warrantie ſhall binde, as here in this caſe of our author expreſſely appeareth. But where the right is not in *eſſe* in the heire, or any of his anceſtors, at the time of the fall of the warrantie, there it ſhall not binde. [*u*] As if lord and tenant be, and the tenant make a feoffment in fee with warrantie, and after the feoffor purchaſe the ſeigniorie, and after the tenant ceſſe, the lord ſhall have a *ceſſavit*; for a warrantie doth extend to rights precedent, and never to any right that commenceth after the warrantie: whereof more ſhall be ſaid in this Section. Alſo a warrantie ſhall never barre any eſtate that is in poſſeſſion, reverſion or remainder, that is not deveſted, diſplaced, or turned to a right before, or at the time of the fall of the warrantie.

Vide Sect. 707.

(10 Rep. 95.)

[*u*] 7 E. 3. 48. 30 H. 8. 42.

(10 Rep. 95.)

[*w*] If a leaſe for life be made to the father, the remainder to his next heire, the father is diſſeiſed and releaſeth with warrantie and dieth; this ſhall barre the heire, although the warrantie doth fall, and the remainder commeth in *eſſe* at one time.

[*u*] Lib. 1. fol. 67. Archer's caſe.

[*y*] If there be father and ſonne, and the ſonne hath a rent ſervice, ſuit to a mill, rent charge, rent ſecke, common of paſture, or

[*y*] Temps E. 1. Voucher 296. 31 Aſſ. 13.

(1) [See Note 341.]

22 Aſſ. 36. 41 Aſſ. 6. 23 E. 3. tit. Gar. 74. Lib. 10. fol. 97. E. Seymour's caſe. (9 Rep. 106.)

or other profit *apprender* out of the land of the father, and the father maketh a feoffment in fee with warrantie, and dieth, this ſhall not barre the ſonne of the rent, common, or other profit apprender, *quamvis clauſula ſpecialis warrantiæ vel acquietanciæ in cartis tenentium inſeratur, quia in tali caſu tranſit terra cum onere:* and he that is in ſeiſin or poſſeſſion need not to make any entrie or claime: and albeit the ſonne after the feoffment with warrantie, and before the death of the father, had beene diſſeiſed, and ſo being out of poſſeſſion, the warrantie deſcended upon him, yet the warrantie ſhould not binde him, becauſe at the time of the warrantie made the ſonne was in poſſeſſion. [*] So if my collaterall anceſtor releaſe to my tenant for life, this ſhall not binde my reverſion or remainder, becauſe that the reverſion or remainder continued in me. But if he that hath a rent, common, or any profit out of the land in taile, diſſeiſe the tenant of the land, and maketh a feoffment of the land, and warrant the land to the feoffee and his heires; [a] regularly the warrantie doth extend to all things iſſuing out of the land, that is to ſay, to warrant the land in ſuch plight and manner, as it was at in the hand of the feoffor, at the time of the feoffment with warrantie; and the feoffee ſhall vouch, as of lands diſcharged of the rent, &c. at the time of the feoffment made.

[*] 45 E. 3. 31. 21 H. 7. 11. Vide Sect. 698.

[a] 21 E. 4. 26. 21 H. 7. 9. 3 H. 7. 4. 7. H. 4. 17. 30 H. 8. Dier 42. 30 E. 3. 30. 9 E. 3. 7a. 45 E. 3. Voucher 72. F. N. B. 135. 14 H. 8. 6. (Ant. 366. b. Moor 56.)

A woman that hath a rent charge in fee entermarrieth with the tenant of the land, an eſtranger releaſeth to the tenant of the land with warrantie; he ſhall not take advantage of this warrantie either by voucher or *warrantia cartæ*; for the wife, if her huſband die, or the heire of the wife living the huſband, cannot have an action for the rent upon a title before the warrantie made; [389. a.] for if the heire of the wife bring an aſſiſe of *mordancester*, this action is grounded after the warrantie, whereunto, as hath beene ſaid, the warrantie ſhall not extend.

(Ant. 366. b.)

So it is if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffment of the land with warrantie, this warrantie cannot extend to the rent, albeit the feoffment was made of the land diſcharged of the rent; for if the condition be broken, and the grantor be intituled to an action, this muſt of neceſſitie be grounded after the warrantie made.

(Ant. 202.)

But in the caſe aforeſaid, when the woman grantee of the rent marrieth with the tenant, and the tenant maketh a feoffment in fee with warrantie, and dieth, in a *cui in vitâ* brought by the wife (as by law ſhe may), [b] the feoffee ſhall vouche as of lands diſcharged at the time of the warranty made, for that her title is paramount: ſo if tenant in taile of a rent charge purchaſe the land, and make a feoffment with warrantie, if the iſſue bring a *formedon* of the rent, the tenant ſhall vouche *cauſâ quâ ſupra*.

[b] 7 H. 4. 17.

[*] But ſome doe hold, that a man ſhall not vouche, &c. as of land diſcharged of a rent ſervice.

[*] 10 E. 4. 9. b. 18 E. 3. 55. 44 E. 3. 19.

[c] Alſo, no warrantie doth extend unto meere and naked titles as by force of a condition with clauſe of re-entry, exchange, mortmaine, conſent to the raviſher and the like, becauſe that for theſe no action doth lye; and if no action can be brought, there can be neither voucher, writ of *warrantia cartæ*, nor rebutter, and they continue in ſuch plight and eſſence as they were by their originall creation, and by no act can be diſplaced or deveſted out of their originall eſſence, and therefore cannot be bound by any warrantie,

[c] Lib. 10. fol. 97. E. Seymore's caſe. 22 Aſſ. pl. 38. 31 Aſſ. p. 13. 41 Aſſ. p. 6. 33 E. 3. Gar. 74. (2 Cro. 596. Dyer 224. a. 3 Inſt. 216. 10 Rep. 98. b. Ant. 205. a. Plowd. 363. b.)

And

[d] And albeit a woman may have a writ of dower to recover her dower, yet becauſe her title of dower cannot be deveſted out of the originall eſſence, a collaterall warrantie of the anceſtor of the woman ſhall not barre her. So it is of a feoffement *cauſâ matrimonii prælocuti.* [d] 34 E. 3. tit. droit 72. 21 E. 4. 82. (4 Rep. Vernon's caſe.)

[e] A warrantie doth not extend to any leaſe, though it be for many thouſand yeares, or to eſtates of tenant by ſtatute ſtaple, or merchant, or *elegit*, or any other chattle, but only to freehold or inheritances, as it appeareth in all *Littleton's* caſes which he putteth in this Chapter. And this is the reaſon, that in all actions which leſſee for yeares may have, a warrantie cannot be pleaded in barre, as in an action of treſpaſſe, or upon the ſtatute of 5 *R.* 2. and the like. But in thoſe actions when the freehold or inheritances doe come in queſtion, there the warrantie may be pleaded: but in ſuch actions which none but a tenant of the freehold can have, as upon the ſtatute of 8 *H.* 6. aſſiſe, or the like, there a warrantie may be pleaded in barre. (1) [e] 21 E. 4. 18. 82. 1 H. 7. 12. 22. 11 H. 7. 15, 16. 20 H. 7. 2. b. 14 H. 7. 22. 43 E. 3. 25. per Finch. in quar. Imp. 15 H. 7. 9. Lib. 10. fol. 97. (Ant. 101. 366. Hob. 14. 28. 2 Bauld. 180.)

"*Quant garrantie eſt fait a un home ſur eſtate, que adonques il* "*avoit, ſi l'eſtate ſoit defeat, le garrantie eſt defeat.*" Here it appeareth, that although a collaterall warrantie be deſcended, [f] yet if the ſtate whereunto the warrantie was annexed be defeated, albeit it be by a meere ſtranger (as in this caſe that *Littleton* here puts by the diſcontinuee) the warrantie is defeated; and although the diſcontinuance remaine, and no remitter wrought to the heire, yet the warrantie is defeated, and barre removed, ſo as the iſſue in taile may have his *formedon*, and recover the land. *Sublato principali tollitur adjunctum.* (2) [f] 3 H. 7. 9. b. 16 E. 3. tit. Continual Claime 10. 9 H. 4. 8. Pl. Com. 168. (10 Rep. 95.)

Sect. 742.

*EN meſme le manner eſt, ſi le diſcontinuee fait feoffement en fee, reſervant a luy un certaine rent, et pur default de payment un re-entry, &c. et un collateral * garrantie de anceſter eſt fait a celuy feoffee que ad eſtate ſur condition, &c. et moruſt ſans iſſue, coment que cel garrantie diſcenderoit ſur l'iſſue en taile, uncore ſi apres le rent ſoit aderere, et le diſcontinuee entra en la terre, † adonques avera l'iſſue en taile ſon recovery per briefe de* formedon, *pur ceo que le collateral garranty eſt defeat. Et iſſint ſi aſcun tiel collateral garranty ſoit pleder envers l'iſſue en le taile, en ſon action de* formedon, *il*

[389. b.]

IN the ſame manner it is, if the diſcontinuee make a feoffement in fee, reſerving to him a certain rent, and for default of payment a re-entrie, &c. and a collaterall warrantie of the anceſtour is made to the feoffee that hath the eſtate upon condition, &c. and dieth without iſſue, albeit that this warranty ſhall deſcend upon the iſſue in tayle, yet if after the rent be behind, and the diſcontinuee enter into the land, then ſhall the iſſue in taile have his recovery by writ of *formedon*, becauſe the collaterall warranty is defeated. And ſo if any ſuch collaterall warrantie be pleaded againſt the

* *garrantie de anceſter eſt ſvit—aunceſter releſſa*, in L. and M. and Roh.

† *&c.* added L. and M. and Roh.

(1) [See Note 342.]

(2) [See Note 343.]

il poit montrer le matter come eſt avantdit, coment le garrantie eſt defeat, &c. et iſſint il poit bien maintainer ſon action, ‡ *&c.*

the iſſue in taile, in his action of *formedon*, he may ſhew the matter as is aforeſaid, how the warrantie is defeated, &c. and ſo hee may well maintaine his action, &c.

(10 Rep. 95.) HERE *Littleton* putteth another caſe upon the ſame ground and reaſon, viz. where the ſtate whereunto the warrantie is annexed is defeated, there the warrantie it ſelfe is defeated alſo, which is one of the maximes of the common law.

Sect. 743.

ITEM, ſi tenant en taile fait un feoffement a ſon uncle, et puis l'uncle fait un feoffement en fee oveſque garrantie, &c. a un auter, et puis le feoffee del uncle enfeoffu areremaine l'uncle en fee, et puis l'uncle enfeoffa un eſtrange en fee ſans garrantie, et moruſt ſauns iſſue, et le tenant en tayle moruſt ſi iſſue en le taile voyle porte ſon breve de formedon *envers l'eſtrange que fuit le darrein feoffee,* ‡ *et ceo per l'uncle, l'iſſue ne ſerra unque barre per le garrantie que fuit fait per le uncle al dit primer feoffee de ſon uncle, pur ceo que le dit garrantie fuit defeat et anient, pur ceo que l'uncle a luy* ‖ *repriſt cy grand eſtate de ſon* § *primer feoffee a que le garrantie fuit fait, ſicome meſme le feoffee avoit de luy. Et la cauſe pur que le garrantie eſt anient en ceo cas eſt ceo, ſcilicet, que ſi le garrantie eſtoieroit en ſa force, donque l'uncle garrantera a luy meſme, que ne poit eſtre.*

ALSO, if tenant in taile make a feoffement to his uncle, and after the uncle make a feoffement in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-enfeoffe againe the uncle in fee, and after the uncle enfeoffeth a ſtranger in fee without warrantie, and dieth without iſſue, and the tenant in tayle dieth, if the iſſue in tayle will bring his writ of *formedon* againſt the ſtranger that was the laſt feoffee, and that by the uncle, the iſſue ſhall not be barred by the warranty that was made by the uncle to the firſt feoffee of his uncle, for that the ſaid warrantie was defeated and taken away, becauſe the uncle tooke backe to him as great an eſtate from his firſt feoffee to whom the warrantie was made, as the ſame feoffee had from him. And the cauſe why the warranty is defeated is this, viz. that if the warrantie ſhould ſtand in his force, then the uncle ſhould warrant to himſelfe, which cannot be.

(Vaugh. 389.) HERE *Littleton* putteth another caſe where a warrantie may be defeated, as when the uncle taketh backe as large an eſtate as he had made, the warrantie is defeated, becauſe he cannot warrant land to himſelfe. [g] And ſo it is if the uncle had made the warrantie to the feoffee, his heires and aſſignes, and taken backe an eſtate in fee, and after infeoffed another, yet the warrantie is defeated, for that he cannot be aſſignee to himſelfe, and a man ſhall [390. a.]

[g] Temps E. 1. Voucher 266. 40 E. 3. 14. 44 E. 3. 38. 25 E. 3. 43. b.

‡ *&c.* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.
‖ *repriſt—priſt*, L. and M. and Roh.
§ *dit* added in L. and M. and Roh.

ſhall not regularly vouche himſelfe as aſſignee of a fee ſimple, and the law will not ſuffer things inutile and unprofitable. [h] And yet if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his heire apparant in fee and dieth, he (as it hath beene ſaid) ſhall vouch himſelfe, and the heire in borow Engliſh, by reaſon the act in law determined the warrantie betweene the father and the ſonne.

[i] But if a man maketh a feoffement in fee with warrantie to the feoffee, his heires and aſſignes, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other ſtranger, the warrantie remaineth ſtill; or if two doe make a feoffement with warrantie to one and his heires and aſſignes, and the feoffee re-enfeoffe one of the feoffors, the warrantie doth alſo remaine.

42. 17 E. 3. 47. 59. 18 E. 3. 56. 29 E. 3. 46. 39 E. 3. 9. 26 E. 3. 68. 14 E. 3. Vouch. 106. 16 E. 3. Voucher 87. 19 E. 3. Vouchee 122. 17 E. 3. 73, 74. 20 H. 6. 29. (2 Roll. Abr. 739.)

[h] 40 E. 3. 14. a. 41 E. 3. 25. a. (Ant. 384. Roll. Abr. 98. a.)

[i] 11 H. 4. 20. (Vaugh. 389.)

Sect. 744.

*MES ſi le feoffee feſoit eſtate al uncle pur terme de vie, ou en taile, ſavant le reverſion, &c. ou que il fuit done en taile al uncle, ou un leas pur terme de vie, le remainder ouſter, &c. en ceſt cas le garrantie n'eſt * pas tout ouſterment avient, mes eſt mis en ſuſpence durant l'eſtate que l'uncle ad. Car apres ceo que l'uncle eſt mort ſans iſſue, † &c. donques celuy en le reverſion, ou celuy en le remainder, barreroit l'iſſue en tayle en ſon brieſe de* formedon *per le collateral garranty en tiel cas, &c. Mes autrement eſt lou l'uncle avoit aury graund eſtate en la terre de le feoffee, a que le garrantie fuit fait, come le feoffee avoit de luy.* Cauſa patet.

BUT if the feoffee had made an eſtate to his uncle for terme of life, or in taile, ſaving the reverſion, &c. or a gift in tayle to the uncle, or a leaſe for terme of life, the remainder, over, &c. in this caſe the warrantie is not altogether taken away, but is put in ſuſpence during the eſtate that the uncle hath. For after that, that the uncle is dead without iſſue, &c. then he in the reverſion, or he in the remainder, ſhall barre the iſſue in taile in his writ of *formedon* by the collaterall warranty in ſuch caſe, &c. But otherwiſe it is where the uncle hath as great eſtate in the land of the feoffee to whom the warrantie was made, as the feoffee hath himſelfe. *Cauſa patet.*

"*PUR terme de vie, ou en taile.*" Here it appeareth [k] that by taking a [l] leaſe for life, or a gift in taile, the warrantie is ſuſpended.

A man infeoffeth a woman with warrantie, they intermarry and are impleaded, upon the default of the huſband, the wife is received, ſhe ſhal vouch her huſband, &c. notwithſtanding the warranty was put in ſuſpence. [m] And ſo on the other ſide, if a woman infeoffe a man with warrantie, and they intermarry and are impleaded, the huſband ſhall vouche himſelfe and his wife by force of the ſaid warrantie.

Vouch. 257. 3 E. 3. ib. 201. 5 E. 3. ib. 178. 18 E. 3. 52. 14 E. 3. Vouch. 190. 31 E. 3. ib. 25. 43 E. 3. 7. 44 E. 3. 38. 32. E. 3. Voucher 102. Voucher 243. 246.

[k] 16 E. 3. Vouch. 87. 44 E. 3. 38. 26 E. 3. 56. 17 E. 3. 47. 10 E. 3. 30. 12 E. 3. Counter plea de vouch. 42. 14 E. 3. ib. 12. (43 Rep. 52.)

[l] 6 E. 2.

[m] 4 E. 2.

An

* *pas* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

(Ant. 348. a.)

[n] An infant *en ventre ſa mere* may be vouched if God give him a birth, and if not, ſuch a one heire to the warrantie; but he cannot be vouched alone without the heire at the common law, for proces ſhall be preſently awarded againſt him.

[n] Temps E. 1. Gard. 153. 31 E. 1. Brieſe 873. 9 E. 2. Vouch. 237. 11 E. 3. ibid. 13. 21 E. 3. quar. imp. 158. 38 E. 3. 7 & 29. 41 E. 3. in Dower. 9 H. 6. 24. Pl. Com. Stowel's caſe per Saunders & Browne.

"Mes eſt miſe en ſuſpence." [o] Tenant in tayle maketh a feoffement in fee with warrantie, and diſſeiſeth the diſcontinuee, and dyeth ſeiſed, leaving aſſets to his iſſue. Some hold that in reſpect of this ſuſpended warrantie and aſſets, the iſſue in taile ſhall not be remitted, but that the diſcontinuee ſhall recover againſt the iſſue in taile, and he take advantage of his warrantie, if any hee hath, and after in a *formedon* brought by the iſſue, the diſcontinuee ſhall barre him in reſpect of the warrantie and aſſets; and ſo every man's right ſaved. (1) [390. b.]

[o] 21 E. 3. 56. a. & b. 38 E. 3. 21. 44 E. 3. 26. 45 E. 3. Title 32. 44 E. 3. ib. 31. 33 E. 3. ib. 4. (3 Leon. 10. Cro. Car. 145.)

Sect. 745.

ITEM, ſi l'uncle apres tiel feoffement fait ove garrantie, ou releaſe fait per luy ove garranty, ſoit attaint de felony, ou utlage de felony, tiel collateral garrantie ne barrera my ne greevera l'iſſue en le taile, pur ceo, que per le attainder de felonie, le ſanke eſt corrupt enter eux, &c.

ALSO, if the uncle after ſuch feoffment made with warrantie, or a releaſe made by him with warranty, be attaint of felony, or outlawed of felony, ſuch collateral warrantie ſhall not bar nor grieve the iſſue in the taile, for this, that by the attainder of felony, the bloud is corrupted betweene them, &c.

Sect. 733. 706. *"OU releaſe fait per luy ove garrantie."* Note a warrantie grounded upon a releaſe. Hereof you ſhall reade before in this Chapter.

9 E. 2. Voucher 237. (Plowd. 397. a.) *"Soit attaint de felony, ou utlage, &c."* Note, according to *Littleton* here, there be two manner of attainders: the one is after apparance, and that in three manners; by confeſſion, by battell, or by verdict: the other upon proces to bee outlawed, which is an attainder in law. But (as hath beene ſaid) there is a great diverſitie, as to the forfeiture of land, betweene an attainder of felony by outlawry upon an appeale, and upon an inditement: for in the caſe of an appeale the defendant ſhall forfeit no lands, but ſuch as he had at the time of the outlawrie pronounced; but in caſe of inditement, ſuch as hee had at the time of the felony committed. And the reaſon of this diverſitie is evident; for that in the caſe of appeale there is no time alleaged in the writ when the felony was done, and therefore of neceſſitie it muſt relate in that caſe only to the judgement of the outlawry: but in the caſe of inditement there is a certain time alleaged, and therefore in that caſe it ſhall relate to the time alleaged in the inditement when the felony was committed. But in the caſe of the inditement there is alſo a diverſitie

(5 Rep. 109. Ant. 13. a. b.)

(1) [See Note 744.]

diverſitie to be obſerved; [o] for, as hath beene ſaid, it ſhall relate to the time alleaged in the inditement for avoyding of eſtates, charges, and incumbrances, made by the felon after the felony committed; but for the meane profits of the land it ſhall relate only to the judgement, aſwell in this caſe of outlawrie as in other caſes. And where *Littleton* ſaith, (*attaint de felony*) if a man be convicted of felony by verdict, and delivered to the ordinary to make purgation, [p] hee cannot be vouched, for that the time of his purgation (if any ſhould be) is uncertaine, and the demandant cannot be delayed upon ſuch an uncertaintie; but the tenant is not without remedie, for hee may have his *warrantia cartæ*.

[o] 33 E. 3. Forfeiture 30. 38 E. 3. 31. 3 E. 4. 25. 19 E. 4. 2. Pl. Com. 488. b.

[p] 8 E. 2. Voucher 237. Vid. 38 E. 3. 29. b. Simile.

"*Attaint.*" Of this word hath beene ſpoken in the ſecond Booke in the Chapter of Villenage.

Upon ſeverall attainders of felonies there lye three ſeverall writs of eſcheate, viz. [*] firſt, when he hath judgement to be hanged: ſecondly, when he is outlawed: thirdly, when he abjureth the realme.

[*] Dame Hale's caſe in Pl. Com. fol. 262.

[q] The defendant in an appeale of death did wage battell, and was ſlaine in the field, yet judgement was given that he ſhould be hanged; and the juſtices ſaid, that it is altogether neceſſarie that ſuch a judgement be given, for otherwiſe the lord could not have a writ of eſcheate. [r] And in eire it hath been ſeene, that a man hath beene attainted after his death by preſentment, &c. (a) The difference betweene a man attainted and convicted is, that a man is ſaid convict before hee hath judgement; as if a man bee convict by confeſſion, verdict, or recreancie. And when he hath his judge-

[391. a.] ment upon the verdict, confeſſion, or recreancie; or upon the outlawrie, or abjuration, then is he ſaid to be attaint. And thus is the law taken at this day, notwithſtanding [s] ſome diverſitie of opinions in our bookes.

[q] 8 E. 3. Judgement 225.

[r] 15 E. 3. Petition 2.

[s] 40 E. 3. 12. 3 E. 3. Corone 365. 8 E. 2. ibid. 293. 21 H. 7.

If a felon be convicted by verdict, confeſſion, or recreancie, he doth forfeit his goods and chattels, &c. preſently. [t] For where a reaſon hath beene yeelded in our bookes, that the praying of his clergie was a refuſall of the judgement of the law, and a flight in law, and for that cauſe he forfeited his goods and chattels, that doth not hold; for if a man be convict of pettie treaſon, or murder, or any other crime, for which he cannot have his clergie, yet by the verie conviction he forfeiteth his goods and chattels before attainder. And [u] *Stanford* (ſpeaking of a felon convict by verdict) ſaith, that he ſhall forfeit his goods which he had at the time of the verdict given, which is the conviction in that caſe; and by the ſtatute of 1 *R.* 3. *cap.* 3. no ſheriffe, bailiffe, &c. ſhall ſeiſe the goods of a felon before hee bee convicted of the felony; whereby it appeareth, that the goods may be ſeiſed as forfeit after conviction. And the [x] old ſtatute is worthy of noting: *Proviſum eſt in curiâ noſtrâ coram juſticiariis noſtris, quòd de cetero nullus homo captus pro morte hominis vel aliâ felonid pro quâ debet impriſonari, diſſeiſietur de terris et tenementis vel catallis ſuis quouſque convictus fuerit.* So as by a conviction of a felon, his goods and chattels are forfeited; but by attainder, that is by judgement given, his lands and tenements are forfeited, and his bloud corrupted, and not before.

[t] Dame Hale's caſe, ubi ſup. 8 H. 4. 2. (12 Rep. 121. 9 Rep. 129.)

[u] Stanf. pl. cor. fol. 192. Lib. 5. fol. 110. Foxleye's caſe. Vide 7 H. 4. 11. 1 R. 3. cap. 3. (3 Inſt. 228.)

[x] Statute de catallis felonum vet. Magna Carta, fol. 66. 2. part.

[y] If the partie upon his arraignment refuſe to anſwer according to law, or ſay nothing, he ſhall not be adjudged to be hanged, but for his contempt, to *peine fort et dure*, which worketh no attainder

[y] Stanf. Pl. Cor. 139. 185.

(a) [See Note 345.]

der for the felony, nor forfeiture of his lands, or corruption of bloud But in cafe of high-treaſon, if the partie refuſe to anſwer according to law, or ſay nothing, hee ſhall have ſuch judgement by attainder, as if he had beene convicted by verdict or confeſſion. (1)

(3 Rep. 10. b.)

[*] Glanvil. lib. 14. ca. 15. Marlb. ca. 25. W. 1. c. 15.

" *Felony.*" [*] *Ex vi termini ſignificat quodlibet capitale crimen felleo animo perpetratum*, in which ſenſe murder is ſaid to be done *per feloniam*, and is ſo appropriated by law, as *felonicè* cannot be expreſſed by any other word.

[a] 3 E. 4. 14. 18 E. 4. 10. 22 Aſſ. 49. 1 E. 3. 13. Stanf. Pl. Cor. 102 E. 8 H. 4. 2.

[a] And in antient times this word (*felonicè*) was of ſo large an extent as it included high-treaſon; and therefore in our antient bookes, by the pardon of all felonies, high-treaſon, or counterfeiting of the great ſeale, and of the king's coine, &c. was pardoned.

[b] 22 Aſſ. 49. (3 Inſt. 47. 4 Rep. 40, 41, 42. 44.)

[b] But afterwards it was reſolved, that in the king's pardon or charter, this word (*felonie*) ſhould only extend to common felonies, and that high-treaſon ſhould not be comprehended under the ſame, and therefore ought to be ſpecially named. And yet that a pardon of all felonies ſhould extend to petite treaſon; wherefore by the law at this day under the word (felony) in commiſſions, &c. is included petite treaſon, murder, homicide, burning of houſes, burglarie, robberie, rape, &c. chance-medly, *ſe defendendo*, and petite larceny.

[c] Stanf. prær. 45. b. 16 E. 3. Coron. 116. & 3 E. 3. Coron. 302.

[c] For ſuch of theſe crimes for which any ſhall have this judgement, to be hanged by the necke till he be dead, he ſhall forfeit all his lands in fee ſimple, and his goods and chattels: for felony by chance-medly, or *ſe defendendo*, or petite larceny, he ſhall forfeit his goods and chattels, and no lands of any eſtate of freehold or inheritance.

(5 Rep. 120. 9 Rep. 65.)

(Vide Ant. 74. 3 Inſt. 112. 1 H. P. C. 354, 355. Vol. 2. 12. 368. Salk. 85. contra.)

And all felonies puniſhable according to the courſe of the common law, are either by the common law, or by ſtatute. There is alſo a felony puniſhable by the civill law, becauſe it is done upon the high ſea, as pyracie, robberie, or murder, whereof the common law did take no notice, becauſe it could not be tried by twelve men. If this pyracie be tried before the lord admirall in the court of the admiraltie, according to the civill law, and the delinquent there attainted, yet ſhall it worke no corruption of bloud, nor forfeiture of his lands; otherwiſe it is if he be attainted before commiſſioners by force of the ſtatute of

[d] 28 H. 8. cap. 15.

[d] 28 *H.* 8. By the expreſſe purview of that ſtatute, about the end of the reigne of queene *Elizabeth*, certaine Engliſh pyrats, that had robbed on the ſea merchants of *Venice*, in amitie with the queene, being not knowen, obtained a coronation pardon, whereby amongſt other things, the king pardoned them all felonies.

(3. Inſt. 112.)

[e] Hill. 2 Jac. Regis.

It was [e] reſolved by all the judges of England upon conference and adviſement, that this did not pardon the pyracie; for ſeeing it was no felonie whereof the common law tooke conuſance, and the ſtatute of 28 *H.* 8. did not alter the offence, but ordaine a triall and inflict puniſhment, therefore it ought to be pardoned ſpecially, or by words which taht amount, and not by the generall name of felony; and according to this reſolution the delinquents were attainted and executed.

Vide Mich. 7 & 8 Eliz. Dier 241. 14 Eliz. Dier. 308. (4 Rep. 43.)

Pyrata commeth of the word πειράτης, which ſignifieth a rover at ſea.

[f] Statute de Magna moneta tempore E. 1. 35 E. 1. de Carliſle, 20 E. 3. cap. 4. (Doct. & Stud. 115.)

Attainder of hereſie or *præmunire* worketh no corruption of bloud, nor hereſie, forfeiture of lands; but in caſe of *præmunire*, forfeiture of lands in fee ſimple, but not of lands in taile, as formerly hath been ſaid. (2)

[f] By ſome ſtatutes it is ſaid, *ſur forfeiture de corps et de avoire*, or *ſub forisfactura omnium quæ in poteſtate ſuâ obtinet*, or to be at the king's will, body, lands, and goods, and

(1) On the *peine forte et dure*, ſee Mr. Juſtice Blackſtone's Commentaries, vol. 4. c. 25.
(2) [See Note 346.]

and the like, theſe are not extended to the loſſe of life or member, but to impriſonment, lands and goods. [g] But if an act of parliament ſaith, *Eeit judgement de vie et member*, or *ſubeat judicium vitæ vel membrorum*, in that caſe judgement of death ſhall be given, [391. b.] as in caſe of felonie, viz. that he be hanged by the necke till he be dead, and conſequently his bloud is corrupted (as our author here ſaith,) and ſhall forfeit as in caſe of felonie.

[g] W. 2. cap. 34. Rot. Parl. 25 E. 1. 1 E. 2. de frang. priſonam. 14 E. 3. cap. 10. Stanf. Pl. Coron. 30. 31.

3 E. 3. Coron. 153. Brooke tit. Coron. 203. 9 E. 4. 26. (11 Rep. 2. 23 H. 8. 25 H. 8. 38 H. 6. by 18 Eliz. 25 Ed. 3.) (11 Rep. 291. 4 Inſt. 123.) (4 Mod. 128. Show. 353.)

[h] There is alſo a court of the conſtable and marſhall, who have conuſance of contracts of deeds of armes, and of warre out of the realme and alſo of things touching warre within the realme, which may not be determined or diſcuſſed by the common law, and alſo all appeales of offences done out of the realme, and they proceed according to the civil law: but theſe things more properly pertaine to another kind of treatiſe, and therefore I ſhall ſpeake no more thereof in this place, but only for the ſatisfaction of the ſtudious reader, to quote ſome authorities of law touching the juriſdiction of that court, that hee may have ſome taſte thereof.

In the ſame manner it is, if a man be attainted of high-treaſon, the warrantie is alſo defeated.

[h] Bract. lib. 4. fol. 248. 48 E. 3. 3. 13 R. 2. cap. 2. Rot. Parl. 21 R. 2. nu. 19. 1 H. 4. c. 14. 13 H. 4. 4 & 5. 37 H. 6. 21. Rot. Parl. 8 R. 2. nu. 31. Fortesc. cap. 32. Rot. Parl. 2 H. 4. 74. 11 H. 4. 24. 30 H. 6. 6. Stanf. Pl. Cor. 65. Stat. de Aſſignat. 4 E. 1. Br. Cor. 196. Rot. Parl. 2 H. 6. nu. 9. Rot. Parl. 5 H. 4. nu. 39. Rot. Vaſc. 9 H. 4. nu. 14. 8 H. 6. nu. 38. 21 E. 4. 17. b. Cateſby. 10 H. 7. per Vavaſor. 18 E. 2. Quar. Imp. 175. 6 E. 3. 41. Paſc. 14 E. 3. in Scac. le Count. de Kent's caſe, p. 39 E. 3. cor. Reg. Rot. 49. le Count. de Lanc. caſe. Rot. Parl. 28 E. 3. nu. 8. Mortimer's caſe. Rot. Parl. 28 E. 3. nu. 13. le Countee de Arundel's caſe.

"Le ſanke eſt corrupt enter eux, &c." [*] Aptly is a man ſaid to be attainted, *attinctus*, for that by his attainder of treaſon or felonie his bloud is ſo ſtained and corrupted, as, firſt, his children cannot be heires to him, nor to any other anceſtor, and therefore the warrantie cannot binde; for thereby heires only are to be bound.

Secondly, if he were noble or gentle before, he and all his children and poſteritie are by this attainder made baſe and ignoble, in reſpect of any nobilitie or gentrie which they had by their birth.

Thirdly, this corruption of bloud is ſo high, that regularly it cannot be abſolutely ſalved but by authoritie of parliament: all which is implyed in the ſame (&c.). (1)

[*] Stanf. lib. 3. Pl. Cor. 195. b. 27 E. 3. 77. 13 H. 4. 8. Vid. Lit. lib. 1. in the Chap. of Dower. (3 Inſt. 240.)

Sect. 746.

ITEM, ſi tenant en taile ſoit diſſeiſie, et puis fait releaſe al diſſeiſor ove garrantie en fee, et puis le tenant en taile eſt attaint, ou utlage de felony, et ad iſſue et moruſt; en ceſt caſe l'iſſue en taile poit enter ſur le diſſeiſor. Et

ALSO, if tenant in taile bee diſſeiſed, and after make a releaſe to the diſſeiſor with warrantie in fee, and after the tenant in taile is attaint, or outlawed of felony, and hath iſſue and dieth; in this caſe the iſſue

(1) The policy and juſtice of our laws of forfeiture in this reſpect are moſt ably diſcuſſed in Mr. Yorke's celebrated Conſiderations on the Law of Forfeiture.

*Et la cauſe eſt pur ceo, que * rien fait diſcontinuance en ceſt caſe forſque le garrantie, et garrantie ne poit diſcender al iſſue en taile, pur ceo, que le ſanke eſt corrupt per enter celuy que fyt le garrantie et iſſue en taile.*

iſſue in taile may enter upon the diſſeiſor. And the cauſe is for this, that nothing maketh diſcontinuance in this caſe but the warrantie, and warrantie may not deſcend to the iſſue in taile, for this, that the bloud is corrupt between him that made the warrantie and the iſſue in taile.

Sect. 747.

CAR le garranty touts foits demurt a le common ley, et la common ley eſt, † ove quant home eſt attaint ou utlage de felonie, quel utlagarie eſt un attainder en ley, que le ſanke perenter luy et ſon fits, et touts auters queux ſerra dits ſes heires, eſt corrupt, iſſint que ‡ riens per diſcent poit diſcender a aſcun que poit eſtre dit ſon heire per le common ley. Et la feme de tiel home que iſſint eſt attaint de felonie, ne ſerra jammes endow de les tenements ſa baron iſſint attaint. Et la cauſe eſt, pur ceo que homes pluis eſchuerent de faire aſcuns felonies. ‡ Mes l'iſſue en tayle quant a les tenements tailes n'eſt pas en tiel cas § barre, pur ceo que ‖ eſt enherite per force de le ſtatute, et nemy per le courſe de common ley: et pur ceo tiel attainder de ſon pier ou de ſon anceſtor en le tayle ¶, ne luy ouſter de ſon droit per force de le taile, &c.

FOR the warrantie alwayes abideth at the common law, and the common law is ſuch, that when a man is attaint or outlawed of felony, which outlawrie is an attainder in law, that the bloud betweene him and his ſonne, and all others which ſhall bee ſaid his heires, is corrupt, ſo that nothing by diſcent may deſcend to any that may bee ſaid his heire by the common law. And the wife of ſuch a man that is ſo attaint, ſhal never be endowed of the tenements of her huſband ſo attainted. And the cauſe is, for that men ſhould more eſchew to commit felonies. But the iſſue in taile as to the tenements tailed is not in ſuch caſe barred, becauſe hee is inheritable by force of the ſtatute, and not by the courſe of the common law: and therefore ſuch attainder of his father or of his anceſtour in the taile, ſhall not put him out of his right by force of the taile, &c.

" *LE iſſue en taile poit enter.*" And the reaſon is, for that by the attainder of the father, it is now in judgement of law but a releaſe without warrantie; for albeit the warrantie at the time of the releaſe was effectuall, yet it worketh no diſcontinuance unleſſe it deſcendeth upon the iſſue in taile; ſo as if it be defeated, extinct, or determined in the life of the tenant in taile, then no diſcontinuance is wrought: and ſo it is if tenant in taile hath iſſue, and releaſeth to the diſſeiſor with warrantie, and after is attainted of felonie, and after obtaineth his pardon and dieth, the iſſue in taile may

Flowd. 252. a. 3 Inſt. 241.)

* *nul* added L. and M. and Roh.
† *tiel* added L. and M. and Roh.
‡ *nul* added L. and M and Roh.
‡ *&c.* added L. and M. and Roh.
§ *barre* not in L. and M. nor Roh.
‖ *il* added L. and M. and Roh.
¶ *&c.* added L. and M. and Roh.

may enter; [*] for the pardon doth not reſtore the bloud as to the warrantie, nor maketh the iſſue in that caſe inheritable to the warrantie. But if the iſſue in taile in that caſe had been attainted of felonie in the life of his father, and obtained his charter of pardon, and then his father had died, the iſſue cannot enter into
392. a. the land in reſpect of the corruption of the bloud upon the attainder of himſelfe: [k] And it is a generall rule, that having reſpect to all thoſe whoſe bloud was corrupted at the time of the attainder, the pardon doth not remove the corruption of bloud neither upward nor downward. As if there be grandfather, father, and ſonne, and the grandfather and father have divers other ſonnes, if the father bee attainted of felonie and pardoned, yet doth the bloud remaine corrupted not onely above him and about him, but alſo to all his children borne at the time of his attainder. But in the caſe of *Littleton*, if tenant in taile at the time of his attainder had no iſſue, and after the obtaining of his pardon had iſſue, that iſſue ſhould have beene bound by the warrantie; for by the pardon he was as a new creature, *tanquam filius terræ*, whoſe bloud upwards remaine corrupted; but for the iſſue had after the pardon, hee is inheritable to his father; and if his father had iſſue before the pardon, and hath iſſue alſo after and dieth, nothing can deſcend to the youngeſt, for that the eldeſt is living and diſabled. But if the eldeſt ſonne had died in the life of the father without iſſue, then the youngeſt ſhould inherit.

[*] 27 E. 3. 77. 1 En. 3. 4. 6 E. 3. 55. 9 H. 5. 9. 31 E. 1. Diſcont. 17. 46 E. 3. Petit. 20. 26 Aſſ. 2. 49 Aſſ. 4. 29 Aſſ. 11. 13 H. 4. 8. 13 H. 7. 17. Pl. Com. in Walſingham's caſe. 3 E. 2. Diſcent. Br. 64. Stanf. Pl. Cor. 195, 196. See in the Chapter of Tenant by the Curteſie, touching this matter. (Plowd. 557. b. Ante 8. a.) [k] Bract. lib. 3. fol. 132, 133. 276, & lib. 5. 374. Britt. fol. 215. b. Flet. lib. 1. cap. 28. (1 Cro. 435. Ant. 8. a.)

"*Le garrantie demurt al common ley:*" The collaterall warrantie is not reſtrained by the ſtatute of *donis conditionalibus*, but a lineall warrantie is reſtrained by the ſtatute, unleſſe there be aſſets; as formerly at large hath beene ſaid. Vid. Sect. 711, 712.

"*Et la feme de tiel home que iſſint eſt attaint, &c. ne ſerra jamais endow, &c.*" It is to be obſerved, that the judgement againſt a man for felonie is, that he be hanged by the neck untill he be
[392. b.] dead; but *implicatiè*, (as hath beene ſaid) he is puniſhed firſt in his wife, that ſhe ſhall loſe her dower. Secondly, in his children, that they ſhall become baſe and ignoble; as hath beene ſaid. Thirdly that he ſhall loſe his poſteritie, for his bloud is ſtained and corrupted, that they cannot inherit unto him or any other anceſtor. Fourthly that he ſhall forfeit all his lands and tenements which he hath in fee, and which he hath in taile, for terme of his life. And fifthly, all his goods and chattels. And thus ſevere it was at the common law; and the reaſon hereof was, that men ſhould feare to commit felonies: *Ut pœna ad paucos, metus ad omnes perveniat.* And it is truly ſaid, *Etſi meliores ſunt quos ducit amor, tamen plures ſunt quos corrigit timor.* And ſo it is *a fortiori* in caſe of high treaſon. But ſome acts of parliament have altered the common law in ſome of thoſe points: firſt, by the ſtatute of *donis conditionalibus*, lands intailed were not forfeited neither for felonie nor for treaſon, but for the life of tenant in taile. This act was made by king *Edward* the firſt, who (as our bookes [i] ſpeake) was the moſt ſage king that ever was: [k] and the cauſe wherefore this ſtatute was made, was to preſerve the inheritance in the bloud of them to whom the gift was made, notwithſtanding any attainder of felonie or treaſon. And this act in hiſtorie is called *gentilitium municipale*; for that by this act the families of many noblemen and gentlemen were continued and preſerved to their poſterities. And this law continued

(8 Rep. 171. Ante 31. a. 37. a. 41. a.) (Lamb. 275, 276.) (3 Inſt. 17. 47. Ant. 41. a.)

[i] 5 E. 3. 14. 9 E. 3. 22. [k] 7 H. 4. 32. 19 H. 6. 71. See Lit. lib. 1. cap. Dow. Sect. 55. (7 Rep. 11.

in force from the thirteenth yeare of king *Edward* the Firſt, untill the [l] twentie-fixth yeare of king *Henrie* the Eighth, when by act of parliament eſtates in taile are forfeited by attainder of high-treaſon. But as to felonies (whereof our author here ſpeaketh) the ſtatute of *donis conditionalibus* doth yet remain in force, ſo as for attainder of felonie, lands or tenements entailed and not forfeited, but only (as hath beene ſaid) during the life of tenant in taile, but the inheritance is preſerved to the iſſues.

[l] 26 H. 8. cap. 13. 33 H. 8. cap. 20. 5 E. 6. ca. 11.

[m] The wife of a man attainted of high treaſon or petit treaſon ſhall not be received to demand dower, unleſſe it be in certaine caſes ſpecially provided for. But the wife of a perſon attainted of miſpriſion of treaſon, murther, or felonie, is dowable ſince our author wrote, [n] by the ſtatute in that caſe made and provided, which is more favourable to the woman than the common law was.

[m] Stanf. Pl. Cor. 195.

[n] 1 E. 6. c. 13. 5 E. 6. c. 11. 5 El. ca. 1. & 11. 18 El. ca. 1.

[o] If a ſeigniorie be granted with warrantie, and the tenancie eſcheat, the ſeigniorie whereunto the warrantie was annexed is extinct, and conſequently the warrantie defeated, and it ſhall not extend to the land; *et ſic in ſimilibus.*

12 H. 4. 3. Vide Sect. 55. (8 Rep. 171.)

If a collaterall anceſtor releaſe with warrantie, and enter into religion, now the warrantie doth binde; but if after he be deraigned, now it is defeated.

[o] 6 H. 4. 1. 45 E. 3. Vouch. 72. Pl. Com. 292.

16 E. 3. Age. 46. 18 H. 3. Vouch. 281. 23 E. 3. Garr. 77. See in the Chapter of Villenage, Sect. 200.

Sect. 748.

ITEM, ſi tenant en le taile enfeoffa ſon uncle, le quel enfeoffa un auter en fee ove garrantie, &c. ſi apres le feoffee per ſon fait releſſa a ſon uncle touts manners des garranties, ou touts manners de covenants reals, ou touts manners de demandes, per tiel releaſe le garrantie eſt extinct. Et ſi le garrantie en cel caſe ſoit pleade envers le heire en taile, que porta ſon briefe de formedon, *pur barrer le heire de ſon action, ſi l'heire avoit * le dit releas et ceo pledaſt, il defetera le plee en barre, &c. Et mults auters caſes et matters y ſont, per queux home poit defeater garrantie, &c.*

ALSO, if tenant in taile infeoffe his uncle, which infeoffes another in fee with warrantie, if after the feoffee by his deed releaſe to his uncle all manner of warrantie, or all manner of covenants realls, or all manner of demands, by ſuch releaſe the warrantie is extinct. And if the warrantie in this caſe bee pleaded againſt the heire in taile that bringeth his writ of *formedon*, to barre the heire of his action, if the heire have and plead the ſaid releaſe, &c. he ſhall defeat the plee in barre, &c. And many other caſes and matters there be, whereby a man may defeat a warrantie, &c.

(1 Rep. 112. b.) *LITTLETON* having ſpoken in what caſes warranties may bee defeated and extinguiſhed by matter in law, now he ſheweth how a warrantie may be diſcharged, or defeated by a matter in deed: and hereupon he putteth an example of a releaſe in three ſeverall manners.

(5 Rep. 71. a.)

Vide Lib. 8. fol. 153, 154. Altham's caſe. Firſt, by a releaſe of all warranties.

Secondly, by a releaſe of all covenants reall.

46 E. 3. 2. 45 E. 3. 23. Vid. before in the Chapter of Releaſes. Sect. 508.

And

* *le dit releas et ceo pledaſt—et pledaſt le dit releas, &c.* in L. and M.

And thirdly, by a releaſe of all demands. (Ant. 291. b.)

[q] If a man make a gift in taile with warrantie, this warrantie is alſo intailed, and therefore a releaſe made by tenant in taile of the warrantie, ſhall not barre the iſſue, no more than his releaſe ſhall bar the iſſue to bring an attaint upon a falſe verdict, or a writ of error upon an erroneous judgement given againſt the father, nor his gift can barre the iſſue of the deed that create the eſtate taile, nor of any other deed neceſſary for defence of the title. [393. a.] [q] 14 Aſſ. pl. 2. 3 Eliz. Dyer. 188. 9 E. 4. 52. b. (Plowd. 2. b. Manxel's caſe. Ant. 319. b. 20. a. 6 Rep. 7.)

"*Apres le feoffee releſſa.*" *Littleton* here putteth his caſe where one is bound to warrant: put the caſe [r] then that two make a feoffement in fee, and warrant the land to the feoffee and his heires, and the feoffee releaſe to one of the feoffors the warrantie, yet he ſhall vouche the other for the moytie. And ſo it is if one infeoffe two with warrantie, and the one releaſe the warrantie, yet the other ſhall vouch for his moytie. (5 Rep. 70.) [r] 45 E. 3. 23. (3 Rep. 14.)

"*Si le heire avoit le dit releas, &c.*" Here it appeareth, that the releaſe being made to the uncle being his anceſtor, the deed doth after the deceaſe of the uncle belong to him, and therefore he cannot plead it, unleſſe he ſheweth it forth.

"*Et mults auters caſes et matters y ſont, per queux home poet de-*
"*feater garrantie, &c.*" As namely by a defeaſance, as other things executorie may. Alſo a warrantie may loſe his force by taking benefit of the ſame. In a *præcipe* the tenant voucheth, and at the *ſequatur ſub ſuo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgement againſt the tenant. And afterwards the demandant brings a *ſcire facias* againſt the tenant to have execution; in this caſe the tenant may have a *warrantia cartæ*. And if in that caſe a ſtranger had brought a *præcipe* againſt the tenant, hee might have vouched againe, for by the judgement given againſt the tenant, the warranty loſt not his force; but if the tenant had judgement to recover in value againſt the vouchee, hee ſhould never vouche againe by reaſon of that warrantie, becauſe hee had taken advantage of the warrantie. And it is to be obſerved, that upon the proces of *ſummoncas ad warrantizandum*, if the ſherife returne the vouchee ſummoned, and he make default, the tenant ſhall have a *capias ad valentiam;* but if he returne that the vouchee had nothing, then after the *ſicut alias et plures* a *ſequatur ſub ſuo periculo* ſhall iſſue; and there if the vouchee make default, the tenant ſhall not have judgement to recover in value, for he was never ſummoned; and it appeareth of record that he hath nothing, but in the *capias ad valentiam* it appeareth that he had aſſets, and he had beene ſummoned before: but in ſome ſpeciall caſes there ſhall be two recoveries in value upon one warrantie. As if a diſſeiſor give lands to the huſband and wife, and to the heires of the huſband, the huſband alieneth in fee with warrantie and dieth, the wife bringeth a *cui in vitâ*, the tenant vouche and recovereth in value, if after the death of the wife the diſſeiſee bring a *præcipe* againſt the alienee, he ſhall vouch and recover in value againe. (Vaugh. 387.) 43 E. 3. 17. Pl. Com. in Browning's caſe. (Hob. 27.)

[s] So it is where the wife bringeth a writ of dower againſt the alienee, he ſhall recover in value, and after her death he ſhall recover in value againe, upon the ſame warrantie. [s] 45 E. 3. Voucher 72.

In

(Hob. 28.)

In the ſame manner it is if a man be ſeiſed of a rent by a defeaſible title, and releaſeth to the tenant of the land all his right in the land, and warranteth the land to him and his heires, if he be impleaded for the rent, he ſhall vouch and recover in value for the rent; and if after he be impleaded for the land, he ſhall vouche and recover in value againe for the land: but in theſe and the like caſes, the reaſon is in reſpect of the ſeverall eſtates recovered, but for one and the ſame eſtate he ſhall never recover but once in value; and though the land recovered in value be evicted, yet ſhall he never take benefit of that warrantie after. And as warranties may be defeated in the whole, ſo they may be defeated as to part of the benefit that may be taken of the ſame. [t] As he that hath a warrantie may make a defeaſance not to take any benefit by way of voucher: in the like manner that he ſhall take no advantage by way of *warrantia cartæ*, or by way of rebutter:

(Ant. 367. b.)

[t] 7 H. 6. 43. 13 Aſſ. 8. 13 E. 3. Garr. 24, 25. 37. 22 H. 6. 51, 8 H. 7. 6.

Sect. 749. [393. b.]

ET eſt aſçavoir, que en meſme le manner come garrantie collateral poit eſtre defeat per matter en fait ou en ley; en meſme le manner poit lineal garrantie eſtre defeat, * *&c. Car ſi l'heire en taile porta briefe de* formedon, *et un lineal garranty de ſon anceſter enheritable per force de le taile, ſoit plede envers luy, ove ceo, que aſſets a luy diſcendiſt de fee ſimple,* † *que il ad per meſme l'auncеſter que fiſt le garrantie; ſi l'heire que eſt demandant poit adnuller et defeater le garrantie, ceo ſuffiſt a luy: car le diſcent des auters tenements de fee ſimple ne fait riens pur barrer l'heire ſans le garrantie, &c.*

AND it is to be underſtood, that in the ſame manner as the collaterall warrantie may bee defeated by matter in deed or in law; in the ſame manner may a lineall warrantie be defeated, &c. For if the heire in taile bringeth a writ of *formedon*, and a lineall warrantie of his anceſtor inheritable by force of the taile, bee pleaded againſt him, with this, that aſſets deſcended to him of fee ſimple, which hee hath by the ſame anceſtor that made the warrantie; if the heire that is demandant may adnull and defeat the warrantie, that ſufficeth him: for the diſcent of other tenements of fee ſimple making nothing to barre the heire without the warrantie, &c.

HERE *Littleton* ſheweth, that in the ſame manner that a collaterall warrantie may be defeated by matter in deed, or by matter in law, ſo may to all intents and purpoſes a lineall warrantie, whereof hee putteth an example of a lineall warrantie and aſſets.

Temps E. 1. Gar. 89. 34 E. 1. ibid. 86. 11 E. 2. ibid. 83. 4 E. 3. 24. 5 E. 3. 14. 40 E. 3. 9. 14 H. 4. 39.

"*Et un lineall garrantie, &c. oveſque ceo que aſſets a luy diſ-*
"*cendiſt, &c.*" Here it appeareth by *Littleton*, that a lineall warrantie and aſſets is a good plea in a *formedon* in the diſcender; wherein it is to be knowen, that if tenant in taile alieneth with warrantie, and leave aſſets to deſcend; if the iſſue in taile doth alien the aſſets, and die, the iſſue of that iſſue ſhall recover the land, becauſe the lineall warrantie deſcendeth only to him without aſſets; for neither

* *&c.* not in L. and M. nor Roh. † *que il ad* not in L. and M. nor Roh.

neither the pleading of the warrantie without the aſſets, nor the aſſets without the warrantie is any barre in the *formedon* in the diſcender. But if the iſſue to whom the warrantie and aſſets deſcended had brought a *formedon*, and by judgement had beene barred by reaſon of the warrantie and aſſets; in that caſe, albeit he alieneth the aſſets, yet the eſtate taile is barred for ever; for a barre in a *formedon* in the diſcender, which is a writ of the higheſt nature that an iſſue in taile can have, is a good barre in any other *formedon* in the diſcender, brought afterwards upon the ſame gift.

24 H. 8. taile Br. 33. 4 Mar. Dier 139. Lib. 10. fol. 37, 38, in Mary Portington's caſe. (8 Rep. 51.) (Ant. 374. a. b.) (10 Rep. 38. Plowd. 440. a. b. Hob. 40. Moor. 55.)

ORE jeo ay fait a toy, mon fits, trois livres.

NOW I have made to thee, my ſonne, three bookes.

"*A TOY, mon fitz, &c.*" Here our author calleth (as many times in theſe bookes he hath done) not only his ſonne *Richard*, but everie ſtudient of the law to be accounted his ſon, and worthily; for that ſeeing our author had the honour to be in his time the father of the law, and all good ſtudients in the law juſtly account themſelves the ſonnes of the law (for otherwiſe they are not worthy of the profeſſion), our author, as a carefull and provident father, as it hath manifeſtly appeared, gave excellent inſtructions in theſe his bookes, both to his owne ſonne, and to his adopted ſonnes, to make them from age to age the more apt and able to underſtand the arguments and reaſons of the law.

[394. a.]

Tabula.

*Le primer Livre eſt de Eſtates que homes ount en terres * ou tenements: ſ'eſtaſcavoir,*

The firſt Book is of Eſtates which men have in lands and tenements; that is to ſay,

De Tenant en fee ſimple	†† Cap. 1
De Tenant en fee taile	2
De Tenant en † fee taile apres ſ'ſſibilitie d'iſſue extinct	3
De Tenant per le curteſie d'Engleterre	4
De Tenant en Dower	5
De Tenant a terme de vie	6
De Tenant pur terme des ans	7
De Tenant a volunt per le common ley	8
De Tenant a volunt per cuſtome del mannor	9
‡ *De Tenant per le verge*	10

* *ou—et*, L. and M. and Roh.

† *fee—le*, L. and M. and Roh.

‡ *De tenant per le verge*, not in L. and M. nor Roh.

†† The numbers of the Chapters as above are not enumerated either in L. and M. or Roh.

Le Second Livre.*

	Cap.
De Homage	1
De Fealtie	2
De Eſcuage	3
De Service de Chivaler	4
De Socage	5
De Frankalmoigne	6
De Homage Auncestrel	7
De Grand Serjeantie	8
De Petit Serjeantie	9
De Tenure en Burgage	10
De Tenure en Villenage	11
De † Rents	12

Et ceux deux petits Livres jeo ay fait a toy pur le melior entender de certaine Chapters de les antient Livre de Tenures.

And theſe two little Books I have made to thee for the better underſtanding of certaine Chapters of the antient Booke of Tenures.

"*MELIOUR entender, &c.*" And theſe Inſtitutes have I collected and publiſhed to the end that theſe three Bookes of our author may be the better underſtood of the ſtudious reader.

"*Antient Livre des Tenures.*" This booke may well be accounted antient, for it was compoſed in the raigne of king *Edward* the Third, (as juſtice *Fitzherbert* ſaith) by a grave and diſcreet man.

Fitz. in his Preface to his N. B.

Le Tierce Livre.‡

	Cap.
De Parceners ‖ ſolonque le courſe del common ley	1
† *De Parceners ſolonque le cuſtome*	2
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De Garranties. §	13

[394. b.]

* *eſt* added L. and M. and Roh.

† *Rents*—iii. *maners de rentes*, ſcilicet, *rent ſervice, rent charge, et rent ſekke*, L. and M. and Roh.

‡ *eſt* added L. and M. and Roh.

‖ *ſolonque le courſe del common ley*, not in L. and M. and Roh.

† *De parceners ſolonque le cuſtome*, not in L. and M. nor Roh.

¶ *Tenants*—*tenements*, L. and M. and Roh.

§ *ſcilicet, garrauntie lyneall, garrauntie collaterall, et garrauntie que commence per diſſeiſin*, added L. and M. and Roh.

* *Epilogus.*

* *Epilogus.*

ET ſaches, mon fits, que jeo ne voile que tu croies, que tout ceo que jeo ay dit en les dits livres ſoit ley, car jeo ne ceo voile enprender ne preſumer ſur moy. Mes de tiels choſes que ne ſont pas ley, enquires et apprendres de mes ſages maſters appriſes en la ley. Nient meins coment que certaines choſes queux ſont motes et ſpecifies en les dits livres, ne ſont pas ley, uncore tielx choſes ferra toy plus apt et able de entender et apprender les arguments et les reaſons del ley, &c. Car per les arguments et les reaſons en la ley, home pluis toſt aviendra a le certaintie et a la conuſans de la ley.

AND know, my ſon, that I would not have thee beleeve, that all which I have ſaid in theſe bookes is law, for I will not preſume to take this upon me. But of thoſe things that are not law, inquire and learne of my wife maſters learned in the law. Notwithſtanding albeit that certaine things which are moved and ſpecified in the ſayd bookes, are not altogether law, yet ſuch things ſhall make thee more apt, and able to underſtand and apprehend the arguments and the reaſons of the law, &c. For by the arguments and reaſons in the law, a man more ſooner ſhall come to the certaintie and knowledge of the law.

Lex plus laudatur quando ratione probatur.

"*JEO ne voile enprender de preſumer, &c.*" Here obſerve the great modeſtie and mildneſſe of our author, which is worthy of imitation; for *Nulla virtus, nulla ſcientia locum ſuum et dignitatem conſervare poteſt ſine modeſtiâ.* And herein our author followed the example of *Moſes*, who was a judge, and the firſt writer of law; for he was *mitiſſimus omnium hominum qui fuit in terris*, as the holy hiſtorie teſtifieth of him.

"*Les arguments et les reaſons del ley, &c.*" *Ratio eſt anima legis*; for then are we ſaid to know the law, when we apprehend the reaſon of the law; that is, when we bring the reaſon of the law ſo to our owne reaſon, that wee perfectly underſtand it as our owne; and then, and never before, we have ſuch an excellent and inſeparable propertie and ownerſhip therein, as wee can neither loſe it, nor any man take it from us, and will direct us (the learning of the law is ſo chained together) in many other caſes. But if by your ſtudie and induſtrie you make not the reaſon of the law your owne, it is not poſſible for you long to retaine it in your memorie. And [395. a.] wel doth our author couple arguments and reaſons together, *Quia argumenta ignota et obſcura ad lucem rationis proferunt et reddunt ſplendida:* and therefore *argumentari et ratiocinari* are many times taken for one. And that our author may not ſpeake any thing without authority, (which in theſe Inſtitutes we have as we take it manifeſted) his opinion herein alſo agreeth with that of the learned and reverend chiefe juſtice of the court of common pleas, ſir *Richard Hankford*, [*y*] *Home ne ſcavera de quèl mettal un campane eſt, ſi ne ſoit bien bate, ne le ley bien conus ſans diſputation.* And another

[*y*] 11 H. 4. 37.

ſaith,

* Not in L. and M. nor Roh.

Epilogus.

[*] 41 E. 3. 22. Kirton. Vid. Sect. 377. faith, [*] *Jeo aye diſpute ceſt matter pur la apprender la ley.* So as our author hath made a moſt excellent epilogue or concluſion with a grave advice and counſell, together with the reaſon thereof, which all good ſtudents are to know and follow; and with *ſcire* and *ſequi* I will conclude our author's epilogue.

"*Lex plus laudatur quando ratione probatur.*"

Vid Sect. 384. 443. 550. This is the fourth time that our author hath cited verſes.

When I had finiſhed this worke of the firſt part of the Inſtitutes, and looked backe and conſidered the multitude of the concluſions in law, the manifold diverſities between caſes and points of learning; the varietie almoſt infinite of authorities, antient, conſtant and moderne, and withall their amiable and admirable conſent in ſo many ſucceſſions of ages; the many changes and alterations of the common law, and additions to the ſame, even ſince our author wrote, by many acts of parliament, and that the like worke of Inſtitutes had not been attempted by any of our profeſſion whom I might imitate, I thought it ſafe for me to follow the grave and prudent example of our worthy author, not to take upon me, or preſume that the reader ſhould thinke that all that I have ſaid herein to be law: yet this I may ſafely affirme, that there is nothing herein but may either open ſome windowes of the law, to let in more light to the ſtudent by diligent ſearch to ſee the ſecrets of the law, or to move him to doubt, and withall to inable him to inquire and learne of the ſages, what the law, together with the true reaſon thereof, in theſe caſes is: or laſtly, upon conſideration had of our old bookes, lawes, and records, (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene ſince changed; knowing for certaine, that the law is unknowen to him that knoweth not the reaſon thereof, and that the knowne certaintie of the law is the ſafetie of all. I had once intended, for the eaſe of our ſtudent, to have made a Table to theſe Inſtitutes; but when I conſidered that Tables and Abridgements are moſt profitable to them that make them, I have left that worke to everie ſtudious reader. And for a farewell to our juriſprudent, I wiſh unto him the gladſome light of juriſprudence, the lovelineſſe of temperance, the ſtabilitie of fortitude, and the ſoliditie of juſtice.

FINIS.

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A TABLE OF THE HEADS CONTAINED IN THE FOLLOWING TABLE.

A.

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